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No. 06-_____ 06-49

In The

Supreme Court of the United States

JOHN HANCOCK LIFE INSURANCE COMPANY; SIGNATOR INVESTORS, INC.; SIGNATOR INSURANCE AGENCY, INC.,

Petitioners,

vs.

RALPH F. PATTEN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether (in conflict with the decisions of ten other federal courts of appeals) a court may vacate an arbitrator's award for "manifest disregard of the law" on the ground that the arbitrator construed an "unambiguous" contract in a way that is "not reasonable"?

2. Whether (in conflict with the decisions of at least eight other federal courts of appeals) a court may vacate an arbitrator's award for not "drawing its essence from the agreement" on the ground that the arbitrator construed an "unambiguous" contract in a way that is "not reasonable"?

3. Whether (in conflict with the decision of at least one other federal court of appeals) an arbitrator's award may be vacated on the ground that it does not "draw its essence from the agreement," even though the award was rendered under a private agreement subject to the Federal Arbitration Act rather than a collective bargaining agreement governed by the Labor-Management Relations Act?

4. Whether an arbitral award may be vacated on nonstatutory, merits-based grounds – such as that the arbitrator manifestly disregarded the law or that the award did not draw its essence from the agreement – despite the explicit requirement of 9 U.S.C. § 9 that a court "must" confirm an arbitral award unless the award is vacated or corrected as provided in 9 U.S.C. §§ 10 and 11?

PARTIES AND DISCLOSURE STATEMENT

All parties in the courts below are named in the caption. John Hancock Mutual Life Insurance Company changed its name to John Hancock Life Insurance Company in March 2000, before this action commenced, and was incorrectly identified by its old name in the pleadings and caption below.

Manulife Financial Corporation, a publicly traded company, is the parent corporation of John Hancock Life Insurance Company, Signator Insurance Agency, and Signator Investors, and directly or indirectly owns 100% of their stock. There are no other publicly held corporations or entities that own 10% or more of the stock of John Hancock Life Insurance Company, Signator Insurance Agency, or Signator Investors.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, together with Judge Luttig's dissent, is reported at *Patten v. Signator Ins. Agency*, 441 F.3d 230 (4th Cir. 2006), and reprinted in the Appendix ("Pet. App.") at 1a-16a. The memorandum and order of the District Court, from which appeal was taken, are reprinted at 17a-20a. The relevant arbitrator's decision is reprinted at 21a-32a. Other memoranda and orders of the District Court in this case, together with the Court of Appeals' order denying rehearing and its mandate, are reprinted at 33a-45a.

JURISDICTION

The Court of Appeals entered judgment on March 13, 2006. Pet. App. 1a, 34a. A timely petition for rehearing was filed on March 27, 2006 and denied on April 11, 2006. *Id.* at 44a-45a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The time in which this petition must be filed extends to and including July 10, 2006, and this petition has been timely filed.

STATUTORY PROVISIONS INVOLVED

This petition involves Sections 2, 9, 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (2000 & Supp. 2002), which are reprinted at Pet. App. 46a-48a. Sections 203(d) and 301(a) of the Labor-Management Relations Act, 29 U.S.C. §§ 173(d), 185(a) (2000), are reprinted at 48a.

STATEMENT OF THE CASE

A. The Issues Presented.

The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), provides that a court "*must* grant . . . an order" confirming an award "unless the award is vacated, modified,

or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9 (emphasis added). The statutory grounds for vacating, modifying or correcting an award are limited to fundamental procedural unfairness, acts in excess of arbitrators' authority, and specific types of formal or technical error. *See id.* §§ 10-11. By carefully limiting review in this manner, Congress sought to exclude all court review of any matter "affecting the merits" of an arbitral award. H.R. Rep. No. 68-96, at 2 (1924); *accord* S. Rep. No. 68-536, at 3 (1924).

In this case, however, a divided panel of the Court of Appeals for the Fourth Circuit vacated an arbitral award because the arbitrator resolved a dispute over an implied contractual term in a way that the court concluded was "not reasonable" in view of the contractual language. Pet. App. 11a. The court held, over the dissent of Judge Luttig, that this constituted both "manifest disregard of the law" and "fail[ure] to draw [the] award from the essence of the agreement." *Id.* Neither of those two grounds is among the statutory grounds for vacating an award under the FAA.

The Fourth Circuit's decision in this case goes beyond what other circuits have countenanced. Most of the federal courts of appeals, however, have recognized some form of the "manifest disregard" doctrine or other nonstatutory grounds to review the merits of arbitral awards where the awards have seemed, to those courts, to be significantly erroneous on the law or the facts. The prospect of just that kind of judicial interference has spawned frequent litigation by parties who have lost arbitrations, resulting in substantial cost and delay and often wiping out any efficiencies that resulted from the parties' agreement to arbitrate rather than litigate. It also has resulted in the articulation and application of widely divergent standards for such review, creating substantial conflicts among the circuits and widespread uncertainty and unpredictability.

The "manifest disregard" doctrine owes its existence to confusion over dicta in this Court's now-overruled decision in *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The "essence" doctrine, in some, but not all circuits, has been imported into the FAA context from this Court's decisions in the context of collective bargaining agreements and related arbitrations. *See, e.g., United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This Court has never squarely addressed the appropriateness of the "manifest disregard" doctrine, nor has it ever decided whether the "essence" doctrine constitutes grounds to vacate an award under the FAA. This petition asks the Court to resolve the conflict among the circuits, and to restore the certainty and finality that the FAA was meant to achieve, by reviewing whether such nonstatutory merits review is permitted at all under the FAA, and if so, what standards should govern such reviews.

B. The Dispute Underlying the Arbitration.

In 1992, respondent Ralph F. Patten, Jr., entered into an agreement (the "Mutual Agreement") with John Hancock Mutual Life Insurance Company (now known as John Hancock Life Insurance Company) and its affiliates, including Signator Investors and Signator Insurance Agency (collectively, "John Hancock" or "Company"). Pet. App. 2a, 66a-72a. The Mutual Agreement provided that the parties' disputes must be resolved by arbitration. *Id.* The Mutual Agreement also provided that an "aggrieved party must give written notice of any claim to the other party within one (1) year of . . . the event giving rise to the claim," or "the claim shall be void and deemed waived. . . ." *Id.* at 67a.

In 1998, Mr. Patten entered into a second agreement (the "Management Agreement") with Signator Investors. Pet. App. 73a-82a. The Management Agreement stated that it "supersede[d] all previous agreements, oral or written, between the parties hereto regarding the subject matter hereof. . . ." *Id.* at 81a-82a. The Management Agreement required arbitration of all claims between Signator Investors and Mr. Patten, but it did not expressly state a time in which to serve a demand for arbitration. *Id.* at 3a, 81a.

On December 13, 2000, effective January 2, 2001, petitioners terminated Patten as an independent agent "for advancing premiums on behalf of his clients, in violation of company policy." Pet. App. 3a; *see id.* at 93a-102a, 112a-113a. There is no dispute that advancing premiums in this way was barred by John Hancock's written policies and procedures, and that Mr. Patten made the payments. *Id.* at 57a, 90a, 95a-102a, 105a-116a. Conceding his breaches of policy, Mr. Patten nonetheless asserted that he was fired not for misconduct but because of his age, and that his termination breached his contract. *Id.* at 56a-60a, 88a-92a.

On August 2, 2001, roughly seven months after his termination, Mr. Patten wrote John Hancock to state that his counsel was "in the process of preparing a lawsuit" but that he was "willing to discuss a peaceful resolution." Pet. App. 61a-62a. John Hancock responded that it had already negotiated payment of post-termination commissions with Mr. Patten and considered the matter closed. *Id.* at 126a-128a.

More than thirteen months after his termination, Mr. Patten sent a letter to John Hancock, dated February 15, 2002, and received March 4, 2002, demanding arbitration of claims for unlawful discrimination under the civil rights laws of the United States, Massachusetts, and Maryland; wrongful termination; breach of contract; and breach of

the covenant of good faith and fair dealing. Pet. App. 4a, 63a-64a. John Hancock responded that, under the Mutual Agreement, Mr. Patten had had only one year to give written notice of any claim; thus, his demand was untimely. *Id.* at 129a-130a.

C. The Arbitration Proceedings.

On May 20, 2002, alleging jurisdiction under 28 U.S.C. § 1332, Mr. Patten filed a Complaint for Enforcement of Arbitration in the United States District Court for the District of Maryland. Pet. App. 50a-55a.[1] On November 5, 2002, the District Court ordered the parties to arbitrate, holding that whether Mr. Patten had commenced the arbitration in a timely manner was an issue for the arbitrator. *Id.* at 39a-43a.

On January 24, 2003, Mr. Patten filed a Demand for Arbitration with the American Arbitration Association. Pet. App. 26a. The parties selected John Truesdale, a former National Labor Relations Board chairman, as arbitrator. *Id.* at 21a; *see* NLRB Press Release, Nov. 22, 1999, *available at* http://www.nlrb.gov/nlrb/press/releases/r2354.asp. In the ensuing year, the parties made submissions, exchanged witness lists, and engaged in discovery. Pet. App. 26a.

On December 8, 2003, John Hancock filed a Motion for Summary Judgment with Arbitrator Truesdale, seeking dismissal of Mr. Patten's claims as untimely. Pet. App. 26a-27a. On January 10, 2004, the arbitrator issued a seven-page decision that identified undisputed facts, interpreted the Mutual and Management Agreements, and

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[1] Respondent is a citizen of Virginia; none of the petitioners is a citizen of Virginia as "citizen" is defined in 28 U.S.C. § 1332. Each is incorporated and has its principal place of business elsewhere. Pet. App. 51a, 83a-84a.

held that Mr. Patten's claims were time-barred. *Id.* at 21a-32a.

Arbitrator Truesdale first concluded that "considering all the circumstances here, there is simply no rational basis for me to find that the August 2, 2001 letter constituted proper notice of a claim under the Mutual Agreement" so as to satisfy its one-year time limit. Pet. App. 30a. He reasoned that the letter did not meet any of the notice requirements of the Mutual Agreement: it was not sent to the proper parties, was not sent by certified or registered mail, did not refer to the Mutual Agreement in any way, and did not "identify and describe the nature of" the claims. *Id.* at 29a-30a.

Arbitrator Truesdale found the Management Agreement "necessarily contains" an implied limit for the filing of claims; otherwise, claims related to the termination could have been brought "two, five, ten, or twenty years" after the termination took place. Pet. App. 30a. He also held that the Management Agreement "was in effect for both the Claimant and the Respondents at the same time as the Mutual Agreement." *Id.* He in turn "look[ed] to the Mutual Agreement for guidance and adopt[ed] its one-year limitation," under which the demand was too late. *Id.*

D. The Proceedings in the District Court.

On April 9, 2004, citing section 10 of the FAA and alleged nonstatutory grounds for vacatur, Mr. Patten moved the District Court to vacate the arbitrator's dismissal of Patten's claims under the Management Agreement. Pet. App. 136a-146a. He argued that the arbitrator had acted "in manifest disregard of the law" and breached the "essence" rule from labor cases by holding that the Management Agreement contained an implied limit for filing claims. *Id.* Patten submitted the award and the

Mutual and Management Agreements, but did not submit the full arbitration record.

On January 4, 2005, the District Court denied Mr. Patten's motion. The court held that to vacate the award for manifest disregard of the law, it would have to find that "(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator[] was well defined, explicit, and clearly applicable to the case." Pet. App. 18a-19a (quoting *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000)). The court concluded, to the contrary, that "Patten has not alleged, nor does this Court find, that the arbitrator blatantly ignored any governing legal principle." *Id.* at 19a.

E. The Proceedings in the Court of Appeals.

On appeal, Mr. Patten sought reversal of the District Court's order insofar as it refused to vacate that portion of the award that dismissed Mr. Patten's claims against Signator Investors under the Management Agreement. Pet. App. 8a.

On March 13, 2006, a divided panel of the Court of Appeals for the Fourth Circuit vacated the District Court's order and remanded for further proceedings as to Signator Investors. The court acknowledged that, "[i]n certain circumstances, when the contracting parties have failed to specify a term that is essential to the determination of their rights and duties under an arbitration agreement, the arbitrator may supply a term that is 'reasonable in the circumstances.'" Pet. App. 11a (citing Restatement (Second) of Contracts § 204 (1981) and *Mo. River Serv., Inc. v. Omaha Tribe*, 267 F.3d 848, 855 (8th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002)). The court also acknowledged that the Management Agreement contained no language explicitly negating the existence of a time limit. *Id.* at 12a. The court held, however, that "[i]n the circumstances of this case," a

one-year period "was not reasonable, in that it contradicted the plain and unambiguous terms of the Management Agreement." *Id.* at 11a. Thus, the court concluded, the arbitrator acted in "manifest disregard of the law" and failed to draw his award from the "essence of the agreement." *Id.* Under Fourth Circuit precedent, those constitute nonstatutory grounds for vacating an arbitral award, despite their absence from the list of grounds set forth in 9 U.S.C. § 10.

The court criticized the arbitrator for "fail[ing] to heed," *first*, the provision of the Management Agreement stating that it "'supersede[d]'" the Mutual Agreement and, *second*, the omission from the Management Agreement of certain terms, including the one-year filing provision, found in the Mutual Agreement. Pet. App. 11a-12a. The court stated, *third*, that, "[i]f the arbitrator felt the need to import a limitations period," he should have looked to Massachusetts law, which governed the agreement. *Id.* at 12a. The majority cited two Massachusetts limitations periods, each more than a year, that might have applied. *Id.* Because, in its view, the award conflicted with "the plain and unambiguous terms of the governing arbitration agreement," the "dispute [did] not fall into the category of awards based on 'misapplication of principles of contractual interpretation [or] erroneous interpretation,' which are not to be disturbed by judicial review." *Id.* at 13a.[2]

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[2] The Court of Appeals' opinion did not address the fact that the clause selecting Massachusetts law applied, by its plain terms, only to disputes *under* the contract, and not to statutory claims *relating to* the contract. Pet. App. 81a-82a. Under each of the three sources of statutory rights that Mr. Patten invoked, his claims were time-barred. 29 U.S.C. § 626(d) (ADEA) (300-day filing period); 42 U.S.C. § 2000e-5(e)(1) (Title VII) (300-day filing period); Md. Ann. Code art. 49B, § 9A(a) (2006) (six months from date of occurrence); Montgomery County Code ch. 27, § 7(d) (Md. 2006) (one-year filing period for complaints of discrimination with the local human rights agency);

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Judge Luttig dissented. Although sharing the view that the Arbitrator's decision was "clearly erroneous" as a matter of contract interpretation, he would have held that "clear error alone is insufficient" to require vacatur. Pet. App. 14a.

As for the standard the panel applied respecting "manifest disregard," Judge Luttig urged, in accord with the First, Second, Sixth, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits, that Mr. Patten "'is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision.'" Pet. App. 14a. Judge Luttig observed that Mr. Patten "cannot demonstrate, nor does anything in the arbitration ruling reflect, that the arbitrator was even aware that the Management Agreement included a clause superseding all previous agreements between the parties, let alone that the arbitrator knew the clause existed, recognized that it superseded the Mutual Agreement, and yet chose to ignore it. . . ." *Id.*

Judge Luttig wrote that the majority also misapplied the "essence of the agreement" test, which turns on

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Mass. Gen. Laws Ann. ch. 151B, § 5 (2002) (300 days from the date of the alleged wrongful act, provided that such act occurred on or after November 5, 2002; claims pertaining to earlier alleged acts must be filed within six months of such acts); *Green v. Wyman-Gordon Co.*, 664 N.E.2d 808 (Mass. 1996) (discrimination claims must meet requirements of ch. 151B). Respondent's statutory claims faced other obstacles, including decisions holding independent insurance agents have no cause of action for age discrimination because such persons are not employees. *Wortham v. Am. Family Ins. Group*, 385 F.3d 1139, 1141 (8th Cir. 2004); *Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir. 2004); Pet. App. 120a-124a. As to any remaining contract claims not preempted by the above, the majority's decision rested on a disagreement with Arbitrator Truesdale about whether the choice-of-law clause or the parties' prior practices provided a better source of authority to address the contractual filing period, as well as other assumptions about how the two agreements interacted. *Cf.* Pet. App. 70a ("survives" clause) *with id.* at 81a-82a ("supersedes" clause).

whether "'the arbitrator must have based his award on his own personal notions of right and wrong,'" *i.e.*, was "not 'even arguably construing or applying the contract.'" Pet. App. 15a. Here, "there is no doubt that the arbitrator was attempting to construe the Management Agreement." *Id.* The award "simply was not a bad faith abdication of his duty to ground the award in the Management Agreement prompted by an illicit desire to rule in favor of appellees." *Id.*

REASONS FOR GRANTING THE WRIT

I. There is a Longstanding and Material Conflict Among the Circuits Over the Standards to Be Applied to Judicial Review of the Merits of Arbitral Awards.

A. The Law on Review of Awards for "Manifest Disregard of the Law" is in Complete Disarray.

In *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), this Court held that a provision of the Securities Act of 1933, which makes compliance with that Act nonwaivable, prevented parties from agreeing to arbitrate claims under the Act. The *Wilko* court of appeals had held otherwise, suggesting in response to the nonwaivability argument that "a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act.'" *Id.* at 436. This Court, however, found that possibility to be insufficient assurance that the Securities Act's provisions would be vindicated, noting that "that failure [of the arbitrators to apply the Securities Act] would need to be made clearly to appear," and stating that "[i]n unrestricted submission[s] [to arbitration] . . . the interpretations of the

law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436-437 (emphasis added).

The Court eventually overruled *Wilko* in *Rodriguez*, holding that parties may validly agree to arbitrate Securities Act claims. *See Rodriguez*, 490 U.S. at 484. But in the meantime, *Wilko*'s brief and cryptic "manifest disregard" dictum had taken on a life of its own in the lower federal courts, where it mutated into a nonstatutory ground for setting aside arbitral awards. The *Wilko* dictum has not only outlived the holding in *Wilko*; it has engulfed the statutory public policy concerns that animated the dictum in the first place. As the decision below illustrates, it has reached even into ordinary issues of contractual interpretation.

The federal courts of appeals that have invoked *Wilko*'s "manifest disregard" language, however, have adopted widely divergent views of its meaning, scope, and application. As one commentator has noted, "[t]o assert that the dictum from the Supreme Court's opinion in *Wilko v. Swan* has, after some [fifty-three] years, left the federal circuit courts of appeals in a state of confusion . . . is an understatement."[3]

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[3] Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 774 (1996). *See also* Stephen L. Hayford, *Reining In the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. Disp. Resol. 117, 125 (describing circuit approaches to the doctrine of manifest disregard as falling into three categories: "futility acknowledged," "big error," and "presumption-based"); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105, 149 (1997) (doctrine is "elusive concept"); Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 Am. Rev. Int'l Arb. 363, 367 (2001) (describing the circuit courts' views of the doctrine as "evolv[ing] in opposite directions"); Revised Uniform Arbitration Act § 23 cmt. c, 7

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In the present case, the Court of Appeals at one point quoted "conscious disregard" language set forth in earlier Fourth Circuit decisions. *See* Pet. App. 9a. But as Judge Luttig pointed out in dissent, the majority ultimately articulated and applied a standard that does not require any showing that the supposed "disregard" was actually "conscious." *See id.* at 14a (Luttig, J., dissenting). Rather, the court's holding was that an arbitrator "manifestly disregards the law" where he construes an "unambiguous" contract by filling a gap in a manner that is "not reasonable." *Id.* at 11a. As formulated by the court below, "manifest disregard" vacatur appears to require only that an arbitrator's award be unreasonable in light of the court's reading of the parties' agreement. This test conflicts with decisions in nearly every other circuit – which are themselves in conflict with each other – in at least four material ways.[4]

First, the Fourth Circuit's new test conflicts with the "conscious disregard" standard as articulated and applied in the First, Eighth, Tenth, and Eleventh Circuits. Under these circuits' "conscious disregard" standard, a court may vacate an award only if the arbitrator "appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it." *Cytyc Corp. v. DEKA Prods. Ltd.*, 439 F.3d 27, 35 (1st Cir. 2006); *accord St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884-885 (8th Cir. 2005); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005); *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910

U.L.A. 79 (2005) (rejecting inclusion of "manifest disregard" in uniform state law, noting case law on the issue is unsettled and conflicting).

[4] The only possible exception is the Third Circuit, which cites *Wilko*'s "manifest disregard" language without giving more specific contours to the doctrine. *See Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003).

(11th Cir. 2006). Prior to the decision below, this standard was perhaps the least deferential to arbitral awards.

Second, the Fourth Circuit's new test conflicts with the more stringent test in the Second, Sixth, Ninth, and District of Columbia Circuits. These courts require not only "conscious disregard" of the law, but also that the law the arbitrators ignore be "well defined, explicit, and clearly applicable to the case." *Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 90-91 (2d Cir. 2005); *accord Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 713 (6th Cir.), *cert. denied*, 126 S. Ct. 735 (2005); *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 838 (9th Cir. 2004); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001).

Third, the Fourth Circuit's standard conflicts with the Fifth Circuit's approach, which permits a court to vacate an award if "it is manifest that the arbitrators acted contrary to the applicable law," *and* if enforcing the award would "result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between parties." *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 217 (5th Cir. 2006). Contrary to the Fifth Circuit's rule, the standard applied below does not take equitable factors into account. *See* Pet. App. 11a (looking solely to specific contract terms).

Fourth, the decision below most starkly conflicts with the law in the Seventh Circuit, which has rejected "manifest disregard of the law" as a nonstatutory ground for vacating an award. Under Seventh Circuit law, an award may be vacated for "manifest disregard of the law" only if the arbitrators "exceeded their powers" by "direct[ing] the parties to violate the law," thereby giving rise to a statutory ground to vacate an award under 9 U.S.C. § 10(a)(4). *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268-269 (7th Cir.

2006); *see also George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001). As Judge Posner wrote in *Wise*, what matters is not whether the arbitrators' "contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, . . . only then were they exceeding the authority granted to them by the contract's arbitration clause." *Wise*, 450 F.3d 265 at 269.

The conflict is plainly material in this case. As Judge Luttig wrote, the majority dispensed with the "conscious disregard" requirement, *see* Pet. App. 14a, which has been employed to reject "manifest disregard" arguments in the First, Second, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits. Indeed, Mr. Patten did not supply to the District Court the full record before the arbitrator – a necessity to showing conscious disregard given the reasoning of the arbitrator's award in this case. The court also noted that the parties' contract was *silent* on the specific issue under review, leaving open a variety of possible means of addressing the disputed issue. Pet. App. 11a-12a. By vacating the award on the ground that it was "not reasonable" for the arbitrator to look to the parties' prior course of dealing in filling the gap, the Fourth Circuit also put itself in conflict with those circuits (Second, Sixth, Ninth, and District of Columbia) that require not only intentional disregard of the law, but that the law so disregarded be "well defined, explicit, and clearly applicable." *See Bear, Stearns*, 409 F.3d at 90-91. Moreover, in contrast to the Fifth Circuit's approach, the Fourth Circuit did not take into account the inequity of requiring petitioners to undergo further arbitration proceedings on an employment discrimination claim when respondent first sought arbitration at least six weeks after any federal or state statutory employment discrimination filing deadline had already expired. *See supra* note 2.

In contrast to the Seventh Circuit's approach, the court below did not determine – and respondent did not contend – that the arbitrator lacked authority to decide the filing period issue. To the contrary, respondent had sought and obtained a binding order, which no party appealed, directing arbitration of *precisely* that issue. Pet. App. 4a, 40a; *see Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).[5]

In sum, this case makes clear that the law of "manifest disregard" review of arbitration awards subject to the FAA is in complete disarray. *See also supra* note 3 (citing commentary). After fifty-three years of confusion in the lower courts over this Court's *Wilko* dictum, the Court should grant the writ to bring order and clarity to the law.

B. The Courts of Appeals Are Similarly in Conflict over Whether and When an Arbitral Award, Outside the Collective Bargaining Context, May Be Vacated on the Ground That It Does Not "Draw Its Essence" from the Parties' Agreement.

The so-called "essence of the agreement" test applied by the Fourth Circuit below has its origin in the *Steelworkers* trilogy – *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v.*

[5] The holding that the arbitrator overlooked an "obvious source" of information about the parties' intent, *i.e.*, the Management Agreement's choice-of-law clause, at worst involves erroneous factfinding. As Judge Posner observed in *Wise*, this "does not fit [the Seventh Circuit's] narrow concept of 'manifest disregard,' though it may that of other courts." *Wise*, 450 F.3d at 269 (citing *Labor Relations Div. v. Teamsters Local 379*, 156 F.3d 13, 20-21 (1st Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 139 (6th Cir. 1996)).

Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) – which dealt with arbitral awards arising under collective bargaining agreements. The statutory policy underlying such arbitration is set forth in § 203(d) of the Labor-Management Relations Act ("LMRA"), which states that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). In that context, this Court concluded that a labor arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *Enterprise Wheel*, 363 U.S. at 597. The Court has applied this test solely in the context of arbitrations under LMRA-governed agreements, and has never extended it to arbitration under other contracts, governed by the FAA. *See Eastern Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 764 (1983); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981); *Alexander v. Gardner-Denver Co.* 415 U.S. 36, 53 (1977).

Like *Wilko*'s "manifest disregard" dictum, the "essence" ground articulated in *Steelworkers* has created confusion and disagreement in the lower courts as to its application outside the collective bargaining arbitration context. At least one court of appeals, the Second Circuit, has concluded that the "essence" ground does not apply at all to non-labor contracts. Even courts that apply this test to non-labor arbitrations are in fundamental conflict about what the standard means. The Court's guidance is needed here, too, to resolve these basic conflicts.

1. The Courts of Appeals Are in Conflict Over Whether the "Essence" Standard Applies at All Outside the Collective Bargaining Context.

The Fourth Circuit held that an arbitration award, even one governed by the FAA, may be vacated if the award "fails to draw its essence from the agreement." Pet. App. 9a. The First and Eighth Circuits also apply the "essence" test as an independent, nonstatutory ground for vacating awards outside of the collective bargaining area. *Cytyc Corp.*, 439 F.3d at 32-33; *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005). The Third, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits apply, at least implicitly, an "essence" test for deciding if an arbitrator has exceeded his or her authority for purposes of 9 U.S.C. § 10(a)(4). *See Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 384 n.8 (5th Cir. 2004); *Jacada*, 401 F.3d at 712; *Yasuda Fire & Marine Ins. Co. v. Cont'l Casualty Co.*, 37 F.3d 345, 349 (7th Cir. 1994); *Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1024 n.2 (9th Cir. 1991); *Kelley v. Michaels*, 59 F.3d 1050, 1053 (10th Cir. 1995); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1179-1181 (D.C. Cir. 1991); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130 n.11 (3d Cir. 1972); *see also Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 584 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1021 (2006).

The Second Circuit, however, has rejected the "essence" test outside the collective bargaining context, as the Fourth Circuit recognized, *see* Pet. App. 10a n.8. In *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002), the court decried an "unfortunate tendency of courts . . . to conflate review of awards under the FAA and under § 301 [of the LMRA]," and rejected application of the "essence" test to FAA-governed awards. *Id.* at 221-222

(citing *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 55 (2d Cir. 2001)).

The Second Circuit is correct. As commentators have observed, "[t]here is no evidence to indicate that Congress or the Supreme Court ever contemplated that the law of commercial arbitration and the law of labor arbitration would become one." Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51 Disp. Resol. J. 22, 84 (1996); *see also* David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 Berkeley J. Emp. & Lab. L. 296, 303 (1998). This Court has noted that "commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter 'arbitration is the substitute for industrial strife.'" *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 378-379 (1974) (citing *Warrior & Gulf*, 363 U.S. at 578). Whatever degree of judicial oversight may be necessary to ensure that labor arbitration is an effective means of achieving industrial peace under a collective bargaining agreement, there is no reason to apply the same rules automatically to the enforcement of voluntary, individual agreements to arbitrate private disputes.

"Because labor arbitration 'has quite different functions from arbitration under an ordinary commercial agreement,' there is good reason to question the wisdom and the propriety of summary adoption of the legal standards for review of arbitration awards from the former sphere into the latter." Hayford & Kerrigan, *supra*, at 83 (citations omitted). The fundamental disagreement among the circuits on whether the "essence of the agreement" standard should govern review outside the labor arbitration context warrants the writ here.

2. The Courts of Appeals Are in Material Conflict Over the Standard to Be Applied to Non-Labor "Essence of the Agreement" Challenges.

The Fourth Circuit's articulation and application of the "essence of the agreement" ground for vacatur – which it apparently conformed to its view of "manifest disregard," allowing an "unreasonable" interpretation of the contract to be set aside – conflicts with nearly every other circuit's view of the law. Those other circuits themselves are in conflict, and "have developed numerous variations of the essence of the contract standard" in the forty-six years since the *Steelworkers* trilogy was decided. Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. Rev. 759, 762; *see also* Feller, *supra*, at 303. This state of affairs is unsurprising given that, as Justice Stevens has aptly observed, this Court's cases "do not provide significant guidance as to what standards a federal court should use in assessing whether an arbitrator's behavior is so untethered to either the agreement of the parties or the factual record so as to constitute an attempt to 'dispense his own brand of industrial justice.'" *Major League Baseball Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (Stevens, J., dissenting).

First, in contrast to the Fourth Circuit's unreasonableness standard, the First, Third, Ninth, Tenth, and D.C. Circuits, when applying an "essence" test, adhere to the rule laid down by this Court in *Misco*, under which an award will stand if "the arbitrator is even *arguably* construing or applying the contract and acting within the scope of his authority." 484 U.S. at 38 (emphasis added). *See Cytyc Corp.*, 439 F.3d at 32; *Metromedia Energy*, 409 F.3d at 584; *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 830-831 (9th Cir. 1995); *Brown v. Coleman*

Co., 220 F.3d 1180, 1182 (10th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001); *Kanuth*, 949 F.2d at 1180. The Seventh Circuit similarly will uphold an award so long as an arbitrator "interpreted the contract," *Watts*, 248 F.3d at 579. These articulations of the "essence of the agreement" doctrine give broad leeway to arbitrators to apply their judgment to contractual issues before them. They do not turn on whether the arbitrator reaches the proper legal conclusion, or even a conclusion that is close to what the court regards as the proper result. The Fourth Circuit standard, as Judge Luttig demonstrated, is qualitatively more intrusive in that it allows the award to be vacated for any error that the court regards as sufficiently glaring, regardless of whether it arose from a good faith attempt to interpret and apply the contract.

Second, the Fifth Circuit holds that an award may not be vacated on "essence of the agreement" grounds even for serious error, as long as the "purpose" of the parties' agreement is fulfilled. The Fifth Circuit thus forbids vacatur if the award "in some logical way, [is] derived from the wording *or* purpose of the contract." *Glover v. IBP, Inc.*, 334 F.3d 471, 475 (5th Cir. 2003) (emphasis added) (quoting *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990) (internal quotation marks and citations omitted)). The Eighth Circuit similarly permits vacatur on "essence of the contract" grounds only if the award is not "derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intention." *McGrann*, 424 F.3d at 749. Again, the Fourth Circuit's standard is qualitatively more intrusive, because it looks to the degree of error in the arbitrator's decision rather than the relation of the decision to the contractual purpose or the broader contractual context.

Only the Sixth Circuit, which allows vacatur in cases, among others, when an arbitrator "imposes additional

requirements not expressly provided for in the agreement" – a standard that has been criticized by judges of that Court – would arguably have sustained the Fourth Circuit's approach here.[6] The Sixth Circuit standard conflicts with the standards articulated in the eight circuits discussed above.

The conflict between the Fourth Circuit's unreasonableness test in this case and the standards in the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits is palpable. Given the "need to import a limitations period into the Management Agreement," Pet. App. 12a, and Arbitrator Truesdale's good-faith decision to look to the parties' prior course of dealing to fill that contractual gap, *id.* at 30a, there can be no reasoned argument that the award crossed the lines set by the approaches adopted by those eight circuits. Even holding aside the errors in the Fourth Circuit's own choice-of-law analysis, which it would have applied to fill the gap, *see supra* note 2, at worst Arbitrator Truesdale merely "fail[ed] to notice" the "supersedes" clause upon which the majority relied, as Judge Luttig explained, or misinterpreted what the Fourth Circuit believed the applicable limitations period to have been. Pet. App. 15a.

The Fourth Circuit's articulation and application of the "essence of the agreement" standard is, like its decision with

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[6] Under Sixth Circuit law: "An arbitrator's award fails to draw its essence from the agreement when: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on 'general considerations of fairness and equity' instead of the exact terms of the agreement." *Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 476 (6th Cir. Mar. 22, 2006). *But see Mich. Family Res., Inc. v. Serv. Employees Int'l Union Local 517M*, 438 F.3d 653, 658 (6th Cir. Jan. 27, 2006), *reh'g en banc granted, opinion vacated* (May 5, 2006) (Sutton, J. concurring) (noting unacceptably high percentage of vacaturs in the Sixth Circuit).

respect to "manifest disregard," misguided, and reflects broad conflict and confusion in the courts of appeals on the basic meaning of that standard for review of arbitral awards. The Court should grant review to resolve that basic conflict.

II. The Text, Structure, and History of the FAA Should Foreclose the Possibility of Judicially Created, Nonstatutory Merits-Based Grounds for Vacating Arbitration Awards.

Review should also be granted because the decision below implicates an important and recurring issue of federal law governing thousands of arbitrations conducted each year subject to the provisions of the FAA. The decision below conflicts with the text, purpose and history of the FAA.

Congress could not have been clearer that judicial revision of awards on matters affecting the merits is not permitted under the FAA. Just as it requires rigorous enforcement of agreements to arbitrate, *see, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985), the FAA also requires the rigorous enforcement of the result of the arbitration – the arbitral award. Specifically, 9 U.S.C. § 9 provides that upon application for an order confirming the award, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." Pet. App. 46a. This Court held in *Byrd* that the word "shall" in 9 U.S.C. § 2 "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed," 470 U.S. at 218. Equally, the word "must" in 9 U.S.C. § 9 requires that courts *must* enforce arbitral awards unless one of the limited grounds

for vacating, modifying or correcting the award set forth in 9 U.S.C. §§ 10 or 11 is present.

Those provisions strictly limit the grounds on which an award may be vacated, modified or corrected. Under § 10, an award may be vacated only:

> (1) Where the award was procured by corruption, fraud, or undue means;
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4), Pet. App. 47a. Similarly, under *id.* § 11 an award may be corrected or modified only:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 11(a)-(c), Pet. App. 48a.

Those grounds simply do not include the kind of merits-based review that has become endemic in the lower courts. Indeed, even if the mandatory language of § 9 left any room for doubt, the precision and narrowness of the

grounds articulated in §§ 10 and 11 precludes an implied general power to correct errors on the merits. For these reasons, commentators have increasingly called for the abolition or substantial reformulation of the "manifest disregard" and related nonstatutory bases for review of the merits of FAA-governed arbitration awards.[7]

The FAA's legislative history confirms that Congress understood it was excluding court review of any matter "affecting the merits." H.R. Rep. No. 68-96, at 2 (1924); *accord* S. Rep. No. 68-536, at 3 (1924). As Julius H. Cohen, a key witness in the 1924 joint House-Senate Judiciary Committee hearings on the bill that became the FAA,[8] stated in his written remarks concerning the bill's intended effect:

> [C]ourts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality it ought not be enforced. This

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[7] *See, e.g.*, Hayford, *Law in Disarray*, *supra* note 3, at 819 (§ 10(a)(3) should be applied); Paul J. Krause, *Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrator's Decisions*, 72 Def. Couns. J. 79, 83 (2005) (Seventh Circuit's test should be adopted); Ian R. MacNeil et al., *Federal Arbitration* § 40.5.1.3 (1995) (§ 10(a)(4) should be applied); Marcus Mungioli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 St. Mary's L.J. 1079, 1121 (2000) (new FAA ground modeled on Fifth Circuit's test should be enacted); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 473 (1998) (degree of error test should be applied); Rubins, *supra* note 3, at 386 (§ 10(a)(4) should be applied or objective test should be adopted); Marta B. Varela, *Arbitration and The Doctrine of Manifest Disregard*, 49 Disp. Resol. J. 64, 75 (1994) (doctrine should be eliminated).

[8] Mr. Cohen was "draftsman for the American Bar Association of the proposed bill." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967). *See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278 (1995) (describing Mr. Cohen's testimony before Congress as "informative" of the FAA's history).

> exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means – cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

Arbitration of Interstate Commercial Disputes, Joint Hearings before the Subcommittees of the Committees on the Judiciary, 68th Cong. 36 (1924) (statement of J.H. Cohen).

Moreover, the "manifest disregard" test and its cousin, the "essence" test, are unnecessary to serve the interests of justice. The interests those doctrines purport to serve are sufficiently protected, as the Seventh Circuit observed in *Wise*, by the express statutory standards for vacatur, modification, or correction set forth in 9 U.S.C. §§ 10 and 11. *Wise*, 450 F.3d at 268-269.

Despite the clear statutory text and plain congressional intent, most courts of appeals have succumbed to the well-intentioned, but ultimately misguided, impulse to overturn awards containing what they regard as obvious errors of law or fact. The decision below takes this tendency to a new extreme and is squarely at odds with Congress's intention to exclude merits review of awards under the FAA. The Court should grant review to correct this persistent and serious departure by the courts of appeals from the letter and purpose of the law.

III. Court Review of the Merits of Arbitral Awards Has Persistently and Unnecessarily Interfered with the FAA's Goal of Protecting the Efficiency and Finality of Arbitration Awards.

Certiorari is warranted because merits review of arbitration awards – especially the wide-ranging type

endorsed by the court below – is impracticable and undermines arbitration as an efficient mechanism for resolving disputes.

Congress enacted the FAA in response to "agitation against the costliness and delays of litigation." H.R. Rep. No. 68-96, at 1-2 (1924). Its purpose was to "reduc[e] technicality, delay, and expense to a minimum and at the same time safeguard[] the rights of the parties." *Id.* Thus, this Court has repeatedly emphasized "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). *See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing legislative history regarding Congress's desire to avoid delay and expense of litigation); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974) (same). Although efficiency is not the only purpose of the Act, *Byrd*, 470 U.S. at 219-220, it is unquestionably a major benefit to both litigants and courts.[9]

Merits-based review of FAA-governed awards is frequently litigated and enormously costly, although it only occasionally alters the outcome of an award.[10] Even

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[9] Julius Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 265-266 (1926); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 499-500 (1998); Linda R. Hirshman, *The Second Arbitration Trilogy*, 71 Va. L. Rev. 1305, 1311 (1985); *see also* Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276-277 (1982); William H. Rehnquist, *A Jurist's View of Arbitration*, 32 Arb. J. 1, 7 (1977).

[10] In employment arbitrations, manifest disregard is raised as much as 42.8 percent of the time, more than any other ground for vacatur. Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements That Expand Court Review of an*

(Continued on following page)

though "manifest disregard" and related merits-based challenges are unsuccessful in the vast majority of cases, the mere availability of such grounds encourages losing parties to challenge arbitral awards. An expansive view of the "manifest disregard" and "essence" doctrines, as was adopted below by the Fourth Circuit, exacerbates this problem.

As the Eleventh Circuit recently lamented, "manifest disregard" and related merits-based challenges to arbitration awards have come routinely to add two layers of judicial proceedings – *i.e.*, district court and court of appeals review – on top of the normal arbitral process. *Hercules Steel Co.*, 441 F.3d at 913. Such delay transforms arbitration from a process by which the arbitrator is "the last decision maker in all but the most unusual cases" to one "in which the arbitrator is only the first stop along the way." *Id.* The irony is that FAA-governed arbitration, despite its goal of finality and efficiency, often becomes more costly than "had there been no arbitration agreement" at all. *Id.* This "deprive[s] [the winning party] and the judicial system itself of the principal benefits of arbitration." *Id.*

Award, 19 Ohio St. J. Disp. Resol. 861, 905-907 (2004). In the Second Circuit Court of Appeals, between 1960 and 2003, manifest disregard was raised forty-eight times, with awards vacated on that ground four times. 3 Thomas H. Oehmke, *Oehmke on Commercial Arbitration* § 149:6 (3d ed. 2006) (citing *Duferco v. Klavenness Shipping*, 333 F.3d 383, 389 (2d Cir. 2003)). *See also* Martin Domke, *Domke on Commercial Arbitration* § 38:9 (2005) (similar statistics); *see also* Hayford, *Reining In the "Manifest Disregard" of the Law Standard*, *supra* note 3, at 139. A Westlaw search of court of appeals cases using a search term "manifest disregard" uncovered, aside from jurisdictional dismissals of frivolous manifest disregard challenges, 197 cases applying the doctrine. These include sixteen reversals of vacaturs, 175 affirmances of enforcement, two affirmances of vacaturs, and four reversals of enforcement. Of the six vacated awards, one was vacated and remanded to the arbitrator for clarification, and ultimately reinstated.

The sheer waste of party and judicial resources devoted to litigating the applicability of merits-based grounds for awards also discourages the use of arbitration as a means of settling disputes.[11] In addition, "manifest disregard" and "essence of the agreement" review discourage the practice among arbitrators of issuing reasoned awards (*i.e.*, awards that explain the basis of the decision) because unexplained awards may not readily lend themselves to the kind of review that can result in the award being vacated.[12]

Review of FAA-governed arbitration awards for "manifest disregard of the law" or failure to "draw on the essence of the agreement" is an impractical exercise. To craft rules that distinguish such review from *de novo* review of an arbitrator's contractual analysis, the courts of appeals have adopted standards that turn, variously, on the arbitrator's subjective knowledge and intent, the role of the parties in inducing the tribunal's erroneous action, the magnitude or materiality of the legal error, the quality of that error (such as whether the error directs the parties "to violate the law" or merely allocates the benefits and burdens of contract performance), as well as the overall

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[11] As one prominent international arbitrator has commented, "[i]n [the] competition [to be selected as an arbitral venue], the US appears to suffer from a self-inflicted comparative disadvantage. For foreign litigants, US arbitration law is not easily accessible when one thinks of the maze of case law implementing the FAA, [and] the ground for vacation of the awards for 'manifest disregard of the law,'" among other factors. Gabrielle Kaufmann-Kohler, *Keynote Speech at the American Arbitration Association Tribute Anniversary Lecture Series: Global Implications of the FAA: The Role of Legislation in International Arbitration: The Federal Arbitration Act at 80* (May 20, 2005), *available at* https://www.adr.org/si.asp?id=2098.

[12] *See* Krause, *supra* note 7, at 83.

equity of the award. *See supra* Part I. The very multiplicity of rules and standards that have emanated from *Wilko* and *Steelworkers* (if the latter is even apt) warrant review to determine if any such standard is consistent with the FAA.

At the very least, given the muddled state of the law in the courts of appeals, this Court's intervention is required to end the confusion wrought by the long shadow of *Wilko*, as well as the related confusion over the "essence of the contract" ground for review. The "manifest disregard" doctrine emanates entirely from dicta in *Wilko*, a case that was overruled more than sixteen years ago, and has never been cited by this Court except in even later dicta. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Yet at least four courts of appeals have held that the "manifest disregard" doctrine is enshrined in this Court's precedents. *See Williams v. CIGNA Fin. Advisors Inc.*, 197 F.3d 752, 759 (5th Cir. 1999) (holding that *First Options* adopts "manifest disregard" as Supreme Court holding), *cert. denied*, 529 U.S. 1099 (2000); *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1459 (11th Cir. 1997) (same); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997) (same); *see also M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-851 (6th Cir. 1996). As the Eleventh Circuit observed in *Hercules Steel*, the current system, almost of necessity, leaves courts and parties "exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards." 441 F.3d at 914.

This Court has repeatedly granted certiorari to clarify important, recurring issues under the FAA, and to overcome

lower courts' hostility to the authority of arbitrators chosen by the parties.[13] Judicial clarification of the FAA is especially important as the Act is so infrequently reviewed and amended by Congress. As it has been in the past, this Court's writ is needed in this case.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for certiorari and reverse the judgment of the Court of Appeals.

Dated: New York, New York
July 10, 2006

Respectfully submitted,

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[13] *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Indeed, as this Court emphasized more than 150 years ago, "[i]f the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 350 (1854); *accord Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 n.4 (1956).

441 F.3d 230

APPENDIX A

United States Court of Appeals,
Fourth Circuit.
Ralph F. PATTEN, Jr., Plaintiff-Appellant,
v.
SIGNATOR INSURANCE AGENCY, INCORPORATED; Signator Investors, Incorporated; John Hancock Mutual Life Insurance Company, Defendants-Appellees.
No. 05-1148.

Argued: Feb. 2, 2006.
Decided: March 13, 2006.

Before WIDENER, LUTTIG, and KING, Circuit Judges.

Vacated and remanded by published opinion. Judge KING wrote the majority opinion, in which Judge WIDENER joined. Judge LUTTIG wrote a dissenting opinion.

OPINION

KING, Circuit Judge:

Appellant Ralph F. Patten, Jr., appeals from the district court's denial of his motion to vacate an arbitration award rendered in favor of John Hancock Mutual Life Insurance Company, Signator Insurance Agency, Incorporated, and Signator Investors, Incorporated (collectively the "respondents"). *Patten v. Signator Ins. Agency, Inc.*, No. 02-1745 (D.Md. Jan. 4, 2005). By this appeal, Patten seeks only to vacate that aspect of the arbitration award dismissing as time-barred his claims against Signator Investors. Patten asserts that the arbitrator acted without authority when he unilaterally imposed an implied one-year

limitations period onto the governing arbitration agreement between Patten and Signator Investors. As explained below, the arbitration agreement does not explicitly prescribe any limitations period with respect to an arbitration demand, and it supersedes all other agreements between the parties. In the circumstances presented, the arbitrator's ruling constituted a manifest disregard of the law and was not drawn from the essence of the governing arbitration agreement. As a result, we vacate the district court's refusal to vacate the arbitration award as to Signator Investors, and we remand for further proceedings.

I.

A.

Patten first began working as a sales agent for Hancock in the Washington, D.C. area in 1972. In 1989, he became a General Agent for Hancock in Bethesda, Maryland. In 1992, he entered into an agreement with Hancock and its affiliates, designated as a "Mutual Agreement to Arbitrate Claims" (the "Mutual Agreement"). J.A. 18.[1] The Mutual Agreement required, inter alia, that any claims arising between Patten and Hancock (or any of Hancock's affiliates or subsidiaries) were to be resolved by mandatory arbitration. The Mutual Agreement specifically provided, in a section captioned "Required Notice of all Claims and Statute of Limitations," that an "aggrieved party must give written notice of any claim to the other party within one (1) year of . . . the event giving rise to the claim," or the claim would be deemed waived. *Id.* It is

[1] Citations to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal.

undisputed that Signator Investors was an "affiliate" of Hancock and thus a party to the Mutual Agreement.

In 1998, Patten entered into a new and superseding agreement with Signator Investors, to become its branch manager in Bethesda (the "Management Agreement").[2] The Management Agreement provided, inter alia, that "Signator [Investors] and Branch Manager [Patten] mutually consent to the resolution by arbitration of all claims or controversies." Management Agmt. ¶ 11. The Management Agreement was silent, however, on any requirements of timing or manner with respect to an arbitration demand. The Management Agreement also provided that it "supersedes all previous agreements, oral or written, between the parties hereto regarding the subject matter hereof." *Id.* at ¶ 12. Finally, the Management Agreement mandated that it was to "be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts." *Id.* at ¶ 13.

On October 18, 1999, Hancock reprimanded Patten for alleged deficiencies in his performance as a General Agent – specifically, for advancing premiums on behalf of his clients, in violation of company policy. On December 13, 2000, the respondents each terminated Patten, effective January 2, 2001. On August 2, 2001, Patten sent a letter to the respondents advising them that he had been wrongfully terminated and discriminated against because of his age, and that he was preparing to file a lawsuit on the basis of these claims. The respondents, by letter of August 30, 2001, advised Patten that his allegations were

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[2] The Management Agreement, found in the Joint Appendix at J.A. 22-26, also authorized Patten to serve as a sales agent for Signator Insurance. Neither Hancock nor Signator Insurance were parties to the Management Agreement.

"unequivocally denie[d]," and the parties then apparently entered into unsuccessful settlement negotiations.

On March 4, 2002, Patten forwarded the respondents a demand for arbitration, asserting claims of discrimination, wrongful termination, and breach of contract. On March 13, 2002, the respondents informed Patten by letter that they would not arbitrate because his demand for arbitration was made fourteen months after his termination, and thus was not "timely or proper" under the Mutual Agreement's one-year limitations period. On March 14, 2002, Patten replied that the Management Agreement (rather than the Mutual Agreement) governed his claims against Signator Investors, and that he would seek judicial enforcement of his rights if the respondents refused to arbitrate.

B.

On May 20, 2002, Patten filed a complaint for enforcement of arbitration in the District of Maryland, seeking to compel arbitration. The parties thereafter filed cross-motions for summary judgment and, on November 5, 2002, the court ruled in favor of Patten and directed the respondents to submit to arbitration. *Patten v. Signator Ins. Agency, Inc.*, No. 02-1745, slip op. at 1 (D.Md. Nov. 5, 2002). Because the court concluded that arbitration should be compelled "under the Mutual Agreement, the Court [found] it unnecessary to address Plaintiff's argument regarding the Management Agreement." *Id.* In its opinion, the court observed that all other questions concerning the arbitration – including the satisfaction of time and notice requirements – were "within the arbitrator's purview." *Id.* at 2.

The parties entered into arbitration in 2003 under the auspices of the American Arbitration Association (the "AAA"). On January 24, 2003, Patten filed a demand for

arbitration with the AAA, making allegations of (1) wrongful termination, (2) breach of contract, (3) breach of the implied covenant of good faith and fair dealing, and (4) unlawful discrimination in violation of federal law as well as the law of Massachusetts and Maryland. After selecting an arbitrator under the procedures of the AAA, the parties engaged in discovery and exchanged witness lists. On December 8, 2003, the respondents filed a motion for summary judgment in the arbitration proceedings, asserting, inter alia, that Patten had failed to comply with the one-year notice provision of the Mutual Agreement. On December 18, 2003, Patten filed an opposition to the respondents' summary judgment request, asserting that the arbitration proceedings arose under both the Management Agreement and the Mutual Agreement. Patten contended that he had complied with the applicable notice requirements of each agreement – maintaining that his August 2, 2001 letter substantially complied with the one-year notice requirement in the Mutual Agreement, and that the Management Agreement contained no limitations period governing when an arbitration demand was to be made.[3]

By his arbitration award of January 10, 2004, the arbitrator dismissed the arbitration proceedings as time-barred and entered summary judgment for the respondents, without conducting a hearing on the merits. *See* Arb. Award at 6.[4] As a preliminary matter, he determined

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[3] Patten also asserted in the arbitration proceedings that advancing a client's premium is a common practice condoned by the respondents and was a pretext for his termination. He alleged that his termination was actually motivated by the respondents' intention to replace him at the Bethesda office with a younger Branch Manager.

[4] The arbitration award is in the Joint Appendix at J.A. 40-46.

that the arbitration proceedings were governed by both the Mutual Agreement and the Management Agreement. While the arbitrator accurately observed that the Management Agreement contained no notice requirement, he determined that it "necessarily contain[ed] an implied term limit." *Id.* The arbitrator then "look[ed] to the Mutual Agreement for guidance," and "adopt[ed]" its one-year limitations period. *Id.* at 7.[5] Because Patten sent his demand for arbitration fourteen months after his termination in January 2001, the arbitrator dismissed Patten's claims "on the sole ground that Claimant's March 4, 2002 Demand for Arbitration is time-barred." *Id.* at 7.

C.

On April 9, 2004, Patten filed a motion in the district court proceedings seeking to vacate the arbitration award's determination that the claims in arbitration under the Management Agreement were time-barred. By this motion, Patten contended that the arbitrator had acted in manifest disregard of the law, and had failed to draw his award from the essence of the agreement, by concluding that the Management Agreement contained an implied one-year limitations period on the filing of an arbitration demand. Patten asserted that the Management Agreement explicitly provided that it "supersede[d]" all previous agreements, and its lack of any limitations period had to be construed against Signator Investors, which had drafted it. On January 4, 2005, the district court denied the motion to vacate, concluding that the arbitrator had

[5] In his award, the arbitrator noted that if Patten's claims had not been time-barred, Patten's allegations and supporting affidavits would have warranted a hearing on the merits. *See* Arb. Award at 6.

not ignored any governing legal principles, and that, in any event, an arbitrator's misinterpretation of an arbitration agreement is not a basis for vacating an arbitration award. *Patten v. Signator Ins. Agency, Inc.*, No. 02-1745, slip op. at 3 (D.Md. Jan. 4, 2005). Patten has filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

The process and extent of federal judicial review of an arbitration award are substantially circumscribed. As a general proposition, a federal court may vacate an arbitration award only upon a showing of one of the grounds specified in the Federal Arbitration Act, *see* 9 U.S.C. § 10(a),[6] or upon a showing of certain limited common law grounds. The permissible common law grounds for vacating such an award, which constitute the essential premises of this appeal, include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law. *See Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 & n.5 (4th Cir. 1998). In reviewing a denial of a motion to vacate an arbitration award, we review the district court's determinations of law de novo. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48, 115 S.Ct.

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[6] The Federal Arbitration Act provides that a federal court may vacate an arbitration award on the following grounds: (1) the award was procured by corruption, fraud, or undue means; (2) partiality or corruption in the arbitrators; (3) the arbitrator was guilty of misconduct or misbehavior in conducting the hearing in a manner which prejudiced a party's rights; or (4) the arbitrator exceeded his powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made. *See* 9 U.S.C. § 10(a).

1920, 131 L.Ed.2d 985 (1995); *Apex Plumbing*, 142 F.3d at 191 n.1.

III.

A.

This dispute was submitted to arbitration pursuant to two separate agreements: first, the Mutual Agreement of 1992, which Patten entered into with Hancock and its affiliates (which included Signator Investors); and second, the Management Agreement, which Patten and Signator Investors entered into in 1998.[7] On appeal, however, Patten seeks only to vacate the arbitrator's dismissal of his claims under the Management Agreement against Signator Investors. Importantly, he does not, in this appeal, take issue with those aspects of the arbitration award dismissing his claims against Hancock and Signator Insurance as time-barred under the Mutual Agreement. Appellant's Br. at 4. Thus, the governing arbitration agreement in this appeal is contained in Paragraph 11 of the Management Agreement between Patten and Signator Investors. That arbitration agreement provides, in pertinent part:

> Signator [Investors] and Branch Manager [Patten] mutually consent to the resolution by

[7] Because the district court's order compelling arbitration declined to reach the issue of whether the parties were obliged to arbitrate under the Management Agreement, its ruling did not preclude the arbitrator from assessing the parties' rights under that agreement. *Patten v. Signator Ins. Agency, Inc.*, No. 02-1745, slip op. at 1 (D.Md. Nov. 5, 2002). And, significantly, Signator Investors has not contended in these proceedings that the arbitrator lacked the authority to arbitrate this dispute under the Management Agreement.

> arbitration of all claims or controversies ("claims") . . . that Signator [Investors] may have against Branch Manager or that Branch Manager may have against Signator [Investors]. . . . The claims covered by this consent to arbitration include all claims arising out of or in connection with the business of Signator [Investors]. . . .

Management Agmt. ¶ 11.

B.

Patten contends that the arbitration award should be vacated as to Signator Investors because the arbitrator's most crucial ruling – that the governing arbitration provision in the Management Agreement contained an implied time limitation on an arbitration demand – constituted a manifest disregard of the law, and failed to draw its essence from the agreement. In seeking to vacate an arbitration award, of course, an appellant "shoulders a heavy burden." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994). Put simply, an arbitrator's legal determination "may only be overturned where it is in manifest disregard of the law," and an arbitrator's interpretation of a contract must be upheld so long as it "draws its essence from the agreement." *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991) (internal quotation marks omitted). Under our precedent, a manifest disregard of the law is established only where the "arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same." *Id.* (internal quotation marks omitted). Moreover, an arbitration award does not fail to draw its essence from the agreement merely because a court concludes that an arbitrator has "misread the contract." *Id.* (internal quotation marks omitted). An

arbitration award fails to draw its essence from the agreement only when the result is not "rationally inferable from the contract." *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998).[8]

In supporting the district court's ruling on the motion to vacate, Signator Investors relies solely on the circumscribed scope of review which we are obliged to apply in assessing an arbitration award. And although the authority of an arbitrator is broad, and subject to great deference under the applicable standard of review, "it is not unlimited." *Mo. River Serv., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 855 (8th Cir. 2001) (internal quotation marks omitted) (vacating award where arbitrator awarded damages in contravention of express contractual provisions). For example, an arbitrator has acted in manifest disregard of the law if he "disregard[s] or modif[ies] unambiguous contract provisions." *Id.* (internal quotation marks omitted). Moreover, an award fails to draw its essence from the agreement if an arbitrator has "based his award on his own personal notions of right and wrong." *Upshur Coals*, 933 F.2d at 229. In such circumstances, a federal court has "no choice but to refuse enforcement of the award." *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (internal quotation marks omitted) (affirming district court's vacatur of award where arbitrator refused to

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[8] While the "essence of the agreement" standard was first articulated by courts reviewing labor arbitration awards, the courts have generally acknowledged that it applies to other arbitration proceedings as well. *See Apex Plumbing*, 142 F.3d at 193 n.5; *see also, e.g., Mo. River Serv., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 854 (8th Cir. 2001). *But see Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 220-21 (2d Cir. 2002).

conduct hearing as required by agreement); *see also U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 531 (4th Cir. 2000) (affirming vacatur of award to probationary employee who was clearly excluded from arbitration agreement).

In this case, as explained below, the arbitrator disregarded the plain and unambiguous language of the governing arbitration agreement when he concluded that it included an implied one-year limitations period. In so doing, the arbitrator acted in manifest disregard of the law and failed to draw his award from the essence of the agreement.

C.

In assessing the timeliness of Patten's arbitration demand, the arbitrator correctly recognized that the Management Agreement contained no explicit time limitation. The arbitrator nonetheless determined, however, that the Management Agreement "necessarily contain[ed] an implied term limit." Arb. Award at 6. In certain instances, when the contracting parties have failed to specify a term that is essential to the determination of their rights and duties under an arbitration agreement, the arbitrator may supply a term that is "reasonable in the circumstances." *See* Restatement (Second) of Contracts § 204 (1981); *see also Mo. River Serv.*, 267 F.3d at 855. In the circumstances of this case, however, the one-year limitations period imposed by the arbitrator was not reasonable, in that it contradicted the plain and unambiguous terms of the Management Agreement.

The Management Agreement unambiguously provided that, as to its parties (Patten and Signator Investors), it

"supersede[d]" the Mutual Agreement. *See* Webster's II New College Dictionary 1107 (1995) (defining "supersede" as "to replace" or "to cause to be set aside or replaced by another"). Despite this clear repudiation of the Mutual Agreement by both Patten and Signator Investors, the arbitrator proceeded to "look to the Mutual Agreement for guidance" and "adopt[ed]" its one-year limitations period. Arb. Award at 7. In so doing, he failed to heed the plain and unambiguous terms of the Management Agreement – not only had Patten and Signator Investors contractually agreed that the Mutual Agreement was superseded, they had also chosen to omit certain of its terms from the Management Agreement, including the one-year limitations period. *See* Management Agmt. ¶ 12.

Moreover, the arbitrator ignored the fact that the Management Agreement provided that it was to "be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts." Management Agmt. ¶ 13. If the arbitrator felt the need to import a limitations period into the Management Agreement, the most obvious source was that which governed their agreement: Massachusetts law. And under Massachusetts law, claims of wrongful termination and discrimination are subject to a three-year statute of limitations, *see* Mass. Gen. Laws ch. 260, § 2A, § 5B, and contract claims must be filed within a six-year period, *see id.* § 2. Utilizing either of these limitations periods, Patten's March 2, 2002 demand for arbitration – submitted to Signator Investors within fourteen months of his termination – would have been timely.

Put succinctly, the arbitrator appears to have revised the governing arbitration agreement on the basis of his own "personal notions of right and wrong," and imposed a

limitations period on the parties that they had specifically rejected. *See Upshur Coals,* 933 F.2d at 229; *see also U.S. Postal Serv.,* 204 F.3d at 527 ("When the arbitrator ignores the unambiguous language chosen by the parties, the arbitrator simply fails to do his job."). Consequently, this dispute does not fall into the category of awards based on "misapplication of principles of contractual interpretation [or] erroneous interpretation," which are not to be disturbed by judicial review. *See Apex Plumbing,* 142 F.3d at 194. Rather, the arbitrator in this instance simply "amend[ed] or alter[ed] the agreement," and thus he "act[ed] without authority." *Mo. River Serv.,* 267 F.3d at 855 (internal quotation marks omitted). The arbitrator's ruling thus resulted in an award that, in the language of *Apex Plumbing,* simply was "not rationally inferable from the contract." *See* 142 F.3d at 193 n.5.

Although our standard of review of an arbitration award is properly a limited and deferential one, it does not require that we affirm an award that contravenes the plain and unambiguous terms of the governing arbitration agreement. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); *Mo. River Serv.,* 267 F.3d at 855. In these circumstances, the arbitration award as to Patten and Signator Investors failed to draw its essence from the governing arbitration agreement and was made in manifest disregard of the law.

IV.

Pursuant to the foregoing, we vacate the district court's denial of Patten's motion to vacate the arbitration

award as to Signator Investors. We remand for such other and further proceedings as may be appropriate.

VACATED AND REMANDED.

LUTTIG, Circuit Judge, dissenting:

I agree with the majority that the arbitrator's interpretation of the Management Agreement was clearly erroneous. I cannot join its opinion, however, because under our precedents, clear error alone is insufficient to vacate an arbitrator's award. Accordingly, I would affirm the district court's denial of appellant's motion to vacate the arbitration award.

In *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994), we held that an arbitrator does not manifestly disregard the law unless he "understand[s] and correctly state[s] the law, but proceed[s] to disregard the same," *see ante* at 235. Although the majority quotes this standard, it neglects the critical explanation of this standard. In that critical explanation, we emphasized that the "appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." *Remmey*, 32 F.3d at 149. It is obvious in this case that appellant has not even come close to meeting this standard. He cannot demonstrate, nor does anything in the arbitration ruling reflect, that the arbitrator was even aware that the Management Agreement included a clause superseding all previous agreements between the parties, let alone that the arbitrator knew the clause existed, recognized that it superseded the Mutual Agreement, and yet chose to ignore it and nevertheless interpret the Management Agreement in light of the Mutual Agreement. *See* J.A. 44-46.

The majority is similarly in error when it concludes that the arbitrator's award failed to "draw its essence from the agreement" because the arbitrator "based his award on his own personal notions of right and wrong." *See ante* at 235-36, 236; *Upshur Coals Corp. v. United Mine Workers, Dist. 31,* 933 F.2d 225, 229 (4th Cir. 1991). *Upshur Coals* equated awards where "the arbitrator must have based his award on his own personal notions of right and wrong" with awards where the arbitrator was not "even arguably construing or applying the contract." *See* 933 F.2d at 229. Appellant does not come close to meeting this standard either, because there is no doubt that the arbitrator was attempting to construe the Management Agreement. *See* J.A. 44-46. The arbitrator's failure to notice the clause simply was not a bad faith abdication of his duty to ground the award in the Management Agreement prompted by an illicit desire to rule in favor of appellees.

At worst, because of a failure to notice the superseding clause, the arbitrator's error arose because he believed that he had to render the two agreements consistent, which led him to imply a notice requirement into the Management Agreement even though no such requirement is expressed in that agreement. *See* J.A. 44-46. We have squarely held that "as a matter of law," an award cannot be vacated merely on the basis of the "misinterpretation of a contract." *See Apex Plumbing Supply, Inc. v. U.S. Supply Co.,* 142 F.3d 188, 193-94 (4th Cir. 1998). Indeed, in *Apex Plumbing,* the party seeking to challenge the award made an unsuccessful argument that was almost identical to the one that Patten does in this case, claiming that "more than a mere 'misinterpretation' of the contract had transpired because the arbitrator's valuation decision irrationally disregarded an unambiguous provision of the Agreement."

Id. at 194. Rejecting the argument, we held that "merely because an arbitrator's decision is not based on an agreement's express terms does not mean that it is not properly derived from the agreement; neither misapplication of principles of contractual interpretation nor erroneous interpretation of the agreement in question constitutes ground for vacating an award." *Id. Apex Plumbing* confirms that the error made by the arbitrator in this case does not rise to the level that permits vacatur by this court.

The level of deference that this court has bestowed upon arbitrators is extraordinary. It may even be excessive. However, we are bound by this standard until such time as it is reconsidered by the court en banc. *See United States v. Collins,* 415 F.3d 304, 311 (4th Cir. 2005). I would, concededly with some reluctance, apply this standard and affirm the district court's refusal to vacate the arbitrator's award.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH F. PATTEN, JR.	:	
v.	:	
SIGNATOR INS. AGENCY, INC., et al.	:	CIVIL NO. L-02-1745

[Filed Jan. 4, 2005]

MEMORANDUM

Pending is Ralph F. Patten's ("Patten") Motion to Vacate Arbitration Award. The motion has been fully briefed and the Court will dispense with a hearing. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated below, the Court will, by separate Order, DENY Patten's Motion to Vacate.

I. BACKGROUND

This case arises from Patten's claims that his termination by John Hancock, Signator Investors, Inc. and Signator Insurance Agency, Inc. (collectively referred to as "Defendants") was unlawful under state and federal law.

On May 20, 2002, Patten filed suit seeking an order compelling Defendants to arbitrate his claims. The parties filed cross motions for summary judgment. On November 5, 2002, the Court ordered Defendants to submit to arbitration.

On January 10, 2004, the arbitrator ruled that Patten's claims were time-barred. (Pl. Mot. to Vacate, Ex. C "Arbitration Ruling".) In reaching that decision, the arbitrator explained that this dispute was governed by two

employment agreements: (i) the Mutual Agreement, and (ii) the Management Agreement. *Id.* The Mutual Agreement required notice, within one-year, of an arbitration demand. *Id.* The Management Agreement, by contrast, contained no express notice requirement. The arbitrator, however, concluded that "it necessarily contains an implied term limit to be considered for the filing of claims." *Id.*

The arbitrator ruled that Defendants did not receive proper notice of an arbitration demand within one-year. *Id.*

Patten subsequently filed the instant Motion to Vacate Arbitration Award.

II. STANDARD OF REVIEW

Judicial review of an arbitration award is "among the narrowest known to the law." *Union Pacific R.R. Co. v. Sheehan,* 439 U.S. 89, 91 (1978). A federal court may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act ("FAA"), or if the arbitrator acted in manifest disregard of the law. *Apex Plumbing Supply v. U.S. Supply Co., Inc.,* 142 F.3d 188, 193 (4th Cir. 1998). A party challenging the award bears the burden in proving that the award should be vacated. *Choice Hotels Int'l, Inc. v. Felizardo,* 278 F. Supp. 2d 590, 594 (D. Md. 2003).

III. ANALYSIS

Patten argues that the arbitrator acted in manifest disregard of the law when he concluded that the Management Agreement contained an implied term limit for the filing of claims. The Court disagrees.

To vacate an arbitration award based on an arbitrator's manifest disregard of the law, the court must find "both that

(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) (citation omitted).

Patten has not alleged, nor does this Court find, that the arbitrator blatantly ignored any governing legal principle.

To the extent that Patten contends that the arbitrator misinterpreted the agreements, which is doubtful at best, that is not a lawful basis on which a court may set aside an arbitration award. *See, e.g., Apex Plumbing Supply,* 142 F.3d at 194 ("[M]erely because an arbitrator's decision is not based on an agreement's express terms does not mean that it is not properly derived from the agreement; neither misapplication of principles of contractual interpretation nor erroneous interpretation of the agreement in question constitutes grounds for vacating an award.").

Accordingly, Patten's Motion to Vacate will be denied.

IV. CONCLUSION

For the reasons stated herein, the Court will, by separate Order, DENY Patten's Motion to Vacate.

Dated this 4th day of January, 2005.

/s/
Benson Everett Legg
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH F. PATTEN, JR.	:	
	:	
v.	:	CIVIL NO. L-02-1745
SIGNATOR INS. AGENCY, INC., et al.	:	

[Filed Jan. 4, 2005]

ORDER

For the reasons stated in the Memorandum of even date, the Court hereby DENIES Ralph F. Patten's Motion to vacate Arbitration Award [Docket No. 14].

It is so ORDERED this 4th day of January, 2005.

/s/
Benson Everett Legg
Chief Judge

APPENDIX D

John C. Truesdale, Esq.
Arbitrator
5123 Worthington Drive
Bethesda, Maryland 20816

ARBITRATION

AAA Case No. 16 160 00087 03

In the Matter of the Arbitration Between

Ralph F. Patten, Jr.
Claimant

And

John Hancock Life Insurance Company
Signator Investors, Inc.
Signator Insurance Agency, Inc.
Respondents

Ruling on Motion for Summary Judgment

This arbitration arises pursuant to two separate agreements between the Claimant and the Respondents:[1] a 1992 agreement captioned "Mutual Agreement to Arbitrate Claims" ("Mutual Agreement") and a 1998 agreement captioned "Management Agreement."

The Mutual Agreement specifically provides that the Arbitrator shall have the authority to entertain a motion for summary judgment and shall apply the standards

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[1] These are the terms used by the Parties to this proceeding. In some papers, the Claimant is referred to [sic] the Plaintiff and the Respondents collectively as the Employer.

governing such motions under the Federal Rules of Civil Procedure.

Appearances

For the Claimant:

John M. Shoreman, Esq.
McFadden & Shoreman P.C.
1900 L Street, N.W., Suite 503
Washington, D.C. 20036

For the Respondents:

Michael J. Murphy, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street, N.W., Fifth Floor
Washington, D.C. 20037

The Arbitrator was selected according to the procedures of the American Arbitration Association. Pursuant to a management conference conducted by AAA on September 15, 2003, it was arranged that initial witness lists would be exchanged by October 10, 2003; dispositive motions would be filed by December 8, 2003; and responses to dispositive motions would be filed by December 22, 2003. All filings were to be made through AAA. The hearing was scheduled for the weeks of January 12 and January 19, 2004.

Background and Facts

The Claimant's work history with John Hancock began in 1972 as a sales agent with the Bingham Agency in Silver Spring, Maryland, continuing as sales manager with the Neil Corey Agency in Washington, D.C. (later Bethesda, Maryland), and, upon Corey's retirement in 1989, as General Agent in Bethesda. In 1992, the Claimant and

John Hancock entered into the Mutual Agreement and in 1998, the Claimant and Signator Investors, Inc. (an affiliate of Signator Insurance Agency, Inc), entered into the Management Agreement.[2]

On October 18, 1999, the Claimant was issued a Letter of Reprimand and fined $500 for certain alleged deficiencies in the operation of his General Agency. On December 13, 2000, as a result of further alleged deficiencies, he was issued a Letter of Termination to be effective December 14, 2000, signed by Grant David Ward, a lawyer for the Compliance Review Group of John Hancock Financial Services, Inc. An appeal filed by a lawyer representing the Claimant was denied and his termination was made effective January 2, 2001.

A second lawyer representing the Claimant engaged in negotiations with the Respondents concerning certain terminal financial matters but there was no discussion of or claims made concerning allegations of discrimination in the Claimant's termination. On August 2, 2001, a third lawyer representing the Claimant, Michael L. Zimmerman, wrote to Grant David Ward stating that

> It is my belief after reviewing the documentation provided to me by Mr. Patten that Mr. Patten was wrongfully terminated by John Hancock and clearly discriminated against. The conduct alleged of Mr. Patten, without agreeing that it actually did occur, was clearly conduct performed by most if not all of John Hancock's general agents. To select Mr. Patten for discipline while

[2] Both Signator Insurance Agency and Signator Investors are affiliates of John Hancock, and, as noted, are collectively referred to by the Parties to this proceeding as the Respondents or the Employer.

> ignoring the actions of other general agents, is discrimination. It would appear that Mr. Patten has been discriminated against partially because of his age.
>
> If Mr. Patten did commit any acts of misconduct, these were done with the knowledge of John Hancock and had been previously condoned by John Hancock.
>
> Our firm is in the process of preparing a lawsuit to be filed on behalf of Mr. Patten. However, I am always willing to discuss a peaceful resolution of a dispute without the necessity of rushing to the Courthouse. [A discussion of where and when to contact him for settlement discussions followed.]

On August 30, 2002 [sic], Philip A. Huvos, a lawyer for John Hancock, responded, denying allegations of wrongful termination and discrimination because of age and said that Mr. Patten's termination was in accordance with the plain language of his contract. The Respondents received no further communication from Mr. Zimmerman.

On March 4, 2002, the Claimant's current lawyer, John M. Shoreman, wrote to Mr. Huvos and Mr. Ward as follows:

> This firm represents Ralph F. Patten, Jr. We hereby demand arbitration of the claims set forth below against John Hancock Mutual Life Insurance Company, Signator Insurance Agency, Inc., and, Signator Investors, Inc. (collectively, the "Company"). These claims arise from Mr. Patten's former position as a General Agent and Branch Manager of the Company.

1. Unlawful discrimination in violation of the civil rights laws of the United States;

2. Unlawful discrimination in violation of the civil rights laws of [Massachusetts];

3. Unlawful discrimination in violation of the civil rights laws of [Maryland];

4. Wrongful termination of the employment relationship;

5. Breach of contract(s);

6. Breach of the implied covenant(s) of good faith and fair dealing.

Mr. Patten reserves his right to submit additional claims prior to the hearing in this matter. We look forward to the Company's timely response.

On March 11, 2002, Mr. Huvos responded that "Signator did not consider Mr. Patten's demand for arbitration to be timely or proper." The Claimant then moved in the United States District Court for the District of Maryland to compel arbitration. Cross-motions for summary judgment were filed. Claimant argued that arbitration was required under the 1992 Mutual Agreement and under the 1998 Management Agreement. Respondents argued that the Claimant had waived arbitration by failing to comply with the notice requirements in the contract. In a Memorandum opinion issued November 5, 2002, the District Court Judge held that "Because the Court holds that arbitration should be compelled under the Mutual Agreement, the Court finds it unnecessary to address Plaintiff's argument regarding the Management Agreement." All other questions, the Judge held, including the satisfaction of notice requirements, fall within the arbitrator's purview.

The Judge issued an order on November 5, 2002, granting Plaintiff's motion for summary judgment, denying Defendants' motion for summary judgment, and ordering them to "SUBMIT to ARBITRATION, as provided for in the Mutual Agreement to Arbitrate Claims."

On January 24, 2003, the Claimant filed a Demand for Arbitration with AAA, alleging as the nature of the dispute: (1) wrongful termination; (2) breach of contract; (3) breach of implied covenant of good faith and fair dealing; (4) unlawful discrimination in violation of the civil rights laws of the U.S., Massachusetts and Maryland. In response, the Respondents filed an Answering Statement on March 7, 2003, denying that Claimant's termination was wrongful or discriminatory; that Claimant was not an employee but an independent contractor; that Claimant had admitted to engaging in the wrongful conduct that led to his termination; and that his claims were time-barred.

After some intervening procedural steps involving the selection of the Arbitrator, discovery, and exchange of witness lists, the Respondents filed a Motion for Summary Judgment on December 8, 2003. Respondents contend that the Claimant's claims are barred by his failure to comply with the one-year notice provision in the Mutual Agreement; that his claim of age discrimination under federal and state law fail as a matter of law because he was not an employee covered by those statutes, but instead was an independent contractor; that he failed to file timely charges of discrimination with the applicable federal and state administrative agencies; and that his claims of age discrimination, wrongful termination, breach of contract, and breach of implied covenant of good faith and fair dealing fail as a matter of law because Respondents ended Claimant's business relationship for lawful and legitimate

business reasons after discovering that Claimant had engaged in repeat misconduct.

In respect to the charge of age discrimination, Respondents state that in order to establish a *prima facie* case, a plaintiff must prove that (1) he is a member of a protected class; (2) he was discharged; (3) that at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) that following the discharge he was replaced by a significantly younger individual of comparable qualifications. For purposes of this summary-judgment motion only, Respondents conceded that Claimant satisfies the first, second, and fourth elements of the *prima facie* case, but that he failed to satisfy the third element and has no credible and probative evidence to show that the reasons assigned for his termination (advancing premium payments for his clients) were not the real reasons.

Claimant filed an Opposition dated December 18, 2003, which stated that this proceeding is governed by both the Management Agreement and the Mutual Agreement. He contends that the arbitration provision in the Management Agreement does not specify any notice or demand requirements. He argues that the Zimmerman letter of August 2, 2001, substantially complies with the one-year notice requirement in the Mutual Agreement. He states that as a general agent of John Hancock, he was under the control of John Hancock's home office and required to follow John Hancock's rules and guidelines in the operation of his agency. He argues that he was terminated on a pretext – paying a premium on behalf of a client – which is a practice, he states (with two supporting affidavits), commonly condoned by John Hancock and never used as a basis for terminating an agent or general

agent. He states that an agent, against whom "irrefutable evidence of forgery" was developed, did not even receive a cautionary warning. He cites "rumors" that he could be replaced as general agent by a younger man who could run his agency for half his compensation.

Provisions of Applicable Agreements

The Mutual Agreement provides that all claims and controversies will be resolved by arbitration, and that covered claims include, but are not limited to, claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to, race, sex, religion, national origin, age, marital status, or medical condition, handicap or disability). It further provides that

> The Company and I agree that the aggrieved party must give written notice of any claim to the other party within one (1) year of the date the aggrieved party first has knowledge of the event giving rise to the claim; otherwise, the claim shall be void and deemed waived even if there is a federal or state statute of limitations which would have given more time to pursue the claim.
>
> Written notice to the Company, or its officers, directors, employees or agents, shall be sent to the Senior Vice President, General Agency Department, P.O. Box 111, Boston, MA 02177. I will be given written notice at the last known business address or other address I have designated.
>
> The written notice shall identify and describe the nature of all claims asserted and the facts upon which such claims are based. The notice shall be

sent to the other party by certified or registered mal [sic], return receipt requested.

The Management Agreement provides that "For employment purposes, the relationship of Branch Manager to Signator is that of an independent contractor and nothing contained herein shall be construed to create an employer and employee relationship . . . " Section 11 of the Management Agreement is entitled "Mandatory Arbitration" and generally tracks the arbitration provisions of the Mutual Agreement except that it does not contain any notice requirement.

Discussion

I find that Claimant's demand for arbitration is time-barred. There is no indication whatsoever that the Claimant's August 2, 2001 letter was intended to satisfy the notice requirement in the Mutual Agreement or that the Respondents were to consider it as such. The Mutual Agreement required that written notice must be given within one year of the date the aggrieved party first has knowledge of the event giving rise to the claim; the notice must be sent by certified or registered mail, return receipt requested, to the Senior Vice President; and it must "identify and describe the nature of all claims and the facts upon which such claims are based." The Claimant's letter of August 2, 2001, was sent to Respondents' lawyer (not to the Senior Vice President), and was sent by plain (not certified or registered, return receipt requested) mail. Further, it did not reference the Mutual Agreement in any way or demand arbitration. On the contrary, it threatened a lawsuit, notwithstanding that the Claimant had agreed in the Mutual Agreement to arbitrate all claims. Moreover, and most importantly, I also find that the letter did not

"identify and describe the nature of all claims and the facts upon which such claims are based." Its general references to "wrongfully terminated" and "clearly discriminated against" "partially because of his age" do not meet the explicit requirements of the Mutual Agreement. Arbitrators are loath to decide cases on the basis of technicalities, so that if the only flaw was to send the letter to the lawyer instead of the Senior Vice President, or to send it to the Senior Vice President but by plain mail, the result would no doubt be different. But, considering all the circumstances here, there is simply no rational basis for me to find that the August 2, 2001 letter constituted proper notice of a claim under the Mutual Agreement.

As for the Management Agreement, which contains no notice requirement, it was in effect for both the Claimant and the Respondents at the same time as the Mutual Agreement. I conclude that it necessarily contains an implied term limit to be considered for the filing of claims. Otherwise, one could argue that a claim could be filed two, five, ten, or twenty years after the occasion of the triggering event, notwithstanding the Mutual Agreement that holds otherwise. In these circumstances, I look to the Mutual Agreement for guidance and adopt its one-year limitation after which "the claim shall be void and deemed waived even if there is a federal or state statute of limitations which would have given more time to pursue the claim."

Turning to other issues raised by the motion for summary judgment, to be successful on such a motion the moving party has the burden to demonstrate the absence of any material factual issue. I conclude that the Respondents have made such a demonstration in respect to the independent-contractor status of the Claimant. However,

that does not resolve this case because the Mutual Agreement requires that all claims be subject to arbitration. As noted by Respondents, under Federal and State law a plaintiff must allege harm to an employer-employee relationship. While Respondents insist that Claimant is an independent contractor, and that there is no employer-employee relationship, it nevertheless entered into an agreement with him in full knowledge of that status and nevertheless agreed that it would resolve all claims by arbitration. It must abide by that agreement. Also, while Respondents cite court cases to the effect that a complaining individual must adhere to certain administrative procedures before filing a lawsuit in federal court, those cases do not stand for the proposition that that rule also applies where the parties have bound themselves to resolve all claims by arbitration and precludes them from resorting to other fora. By adhering to the Mutual Agreement in this respect, Claimant's claims are not barred as a matter of law.

Finally, I should note that if it were not for the time bar that I have found, I would conclude that the Opposition and the affidavits supplied by the Claimant would warrant proceeding to hearing on the sole question of whether, at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations – in other words, implicating in general his contention that advanced premium payments were a common and condoned practice and that he was singled out.

Conclusion

For the foregoing reasons, I grant the Respondents' Motion for Summary Judgment on the sole ground that

Claimant's March 4, 2002 Demand for Arbitration is time-barred.

January 10, 2004

/s/ John C. Truesdale
John C. Truesdale
Arbitrator

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 05-1148
CA-02-1745-BEL

RALPH F. PATTEN Jr.

Plaintiff-Appellant

v.

SIGNATOR INSURANCE AGENCY, INCORPORATED; SIGNATORS INVESTORS, INCORPORATED; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

Defendants-Appellees

[Filed April 19, 2006]

MANDATE

The judgment of this Court, entered 3/13/06, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-1148
CA-02-1745-BEL

RALPH F. PATTEN Jr.

Plaintiff-Appellant

v.

SIGNATOR INSURANCE AGENCY, INCORPORATED; SIGNATORS INVESTORS, INCORPORATED; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

Defendants-Appellees

[Filed March 13, 2006]

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court vacates the judgment of the District Court. The case is remanded to the District Court for further proceedings consistent with the opinion.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

APPENDIX F

From: MDD_CM-ECF_Filing@mdd.uscourts.gov
[mailto:MDD_CM-ECF_Filing@mdd.uscourts.gov]
Sent: Monday, June 12, 2006 11:15 AM
To: MDDdb_ECF@mdd.uscourts.gov
Subject: Activity in Case 1:02-cv-01745-BEL Patten v. Signator Insurance, et al "Order"

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U.S. District Court

District of Maryland

Notice of Electronic Filing

The following transaction was received from Legg, Benson entered on 6/12/2006 at 11:14 AM EDT and filed on 6/12/2006

Case Name: Patten v. Signator Insurance, et al
Case Number: 1:02-cv-1745
Filer:
Document Number: 32

Docket Text:
PAPERLESS ORDER granting [31] status report. Counsel are to submit a status report within 45 days. Signed by Judge Benson Everett Legg on 06/12/2006. (Legg, Benson Everett)

The following document(s) are associated with this transaction:

1:02-cv-1745 Notice will be electronically mailed to:

Michael J Murphy Michael.Murphy@odnss.com

John M Shoreman mstlaw@erols.com

1:02-cv-1745 Notice will be delivered by other means to:

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

RALPH F. PATTEN, JR.,	)	
Plaintiff,	)	
	)	
v.	)	Civil No. L-02-1745
SIGNATOR INSURANCE AGENCY, INC., et al.,	)	
	)	
Defendants.	)	

[Filed June 5, 2006]

STATUS REPORT

Pursuant to this Court's Order dated May 5, 2006, Defendants Signator Insurance Agency, Inc., Signator Investors, Inc., and John Hancock Life Insurance company (collectively "Defendants"), through undersigned counsel, submit the following status report.

Defendants will be filing a timely petition for certiorari seeking review of the judgment of the Fourth Circuit Court of Appeals. The petition is due on or before July 10, 2006.

Because the petition, if granted, may lead to reversal, vacatur, or modification of the Fourth Circuit's decision in a way that may eliminate any need for further proceedings in this Court, Defendants respectfully seek a stay of these proceedings pending the filing and disposition of a petition for certiorari.

Defendants believe the issues raised by Judge Luttig's dissent as well as conflicting interpretations of the applicable federal law in different circuits, as well as other factors that are relevant, present substantial grounds for review.

Defendants therefore respectfully request that this Court continue to stay these proceedings pending the filing and disposition of a petition for certiorari and, if review is granted, pending the handing down of the mandate of the Supreme Court. Defendants maintain that the arbitral award in their favor remains valid in all respects and that this Court should take no action to direct or permit further arbitral proceedings at this time.

Counsel for the Defendants has discussed this stay request with Mr. Shoreman, counsel for the Plaintiff, and Mr. Shoreman has no objection to continuing to stay all proceedings while the Defendants seek Supreme Court review.

Respectfully submitted,

/s/

Michael J. Murphy
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2400 N Street, N.W., Fifth Floor
Washington, D.C. 20037
(202) 887-0855
Counsel for Defendants

Dated: June 5, 2006

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH E. PATTEN, JR.	:	
v.	:	
SIGNATOR INS. AGENCY, et al.	:	CIVIL NO. L-02-1745

[Filed Nov. 6, 2002]

MEMORANDUM

Pending are cross-motions for summary judgment filed by Plaintiff Ralph E. Patten, Jr., and Defendants Signator Insurance Agency, Inc., Signator Investors, Inc., and John Hancock Life Insurance Company (collectively "Defendants"). Because counsel have extensively briefed the motions, the Court will dispense with a hearing. *See* Local Rule 105.6 (D. Md. 2001). For the reasons stated below, the Court will, by separate order:

(i) GRANT Plaintiff's motion for summary judgment;

(ii) DENY Defendants' motion for summary judgment;

(iii) ENTER JUDGMENT for the Plaintiff; and

(iv) DIRECT the CLERK to CLOSE the CASE.

I. ANALYSIS

Plaintiff seeks an order compelling the Defendants to arbitrate Plaintiff's claims stemming from his discharge from employment. Patten claims that arbitration is required

by two separate employment agreements: (i) a 1992 agreement captioned "Mutual Agreement to Arbitrate Claims" ("Mutual Agreement") and (ii) a 1998 document governing the management relationship of the Plaintiff and the Defendants ("Management Agreement"). Because the Court holds that arbitration should be compelled under the Mutual Agreement, the Court finds it unnecessary to address Plaintiff's argument regarding the Management Agreement.

Defendants apparently agree that Patten's employment-related claims are covered by a clause in the Mutual Agreement mandating binding arbitration. Nevertheless, the Defendants argue that Patten waived arbitration by failing to comply with the notice provisions stated in the contract. Specifically, the Defendants maintain that Patten's notice was ineffectual because (i) Plaintiff sent it to the wrong person in the company and (ii) the Plaintiff did not send the notice via certified or registered mail.

Patten counters that the Court should not determine these issues as a threshold matter. Instead, Patten argues that procedural requirements, such as those at issue here, are for the arbitrator to decide.

The Court agrees with the Plaintiff. A district court should consider only two issues in addressing a suit to compel arbitration: (i) whether an arbitration agreement exists and (ii) whether the subject matter of the dispute fits within the scope of the agreement. *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446, 453 (4th Cir. 1997). All other questions, including the satisfaction of notice requirements, fall within the arbitrator's purview. *Id.* at 454.

The Court thanks counsel for their thorough briefing of this issue.

II. CONCLUSION

For the reasons stated herein, the Court will, by separate Order: (i) GRANT Plaintiff's Motion for Summary Judgment; (ii) DENY Defendants' Motion for Summary Judgment; (iii) ENTER JUDGMENT for the Plaintiff; and (iv) DIRECT the CLERK to CLOSE the CASE.

Dated this 5th day of November 2002.

/s/ Benson Legg
Benson Everett Legg
Unites States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH E. PATTEN, JR.	:	
	:	
v.	:	CIVIL NO. L-02-1745
SIGNATOR INSURANCE AGENCY, et al.	:	

[Filed Nov. 6, 2002]

ORDER

Pending are cross-motions for summary judgment filed by Plaintiff Ralph E. Patten, Jr., and Defendants Signator Insurance Agency, Inc., Signator Investors, Inc., and John Hancock Life Insurance Company (collectively "Defendants"). For the reasons stated in the Memorandum of even date, the Court hereby:

(i) GRANTS Plaintiff's motion for summary judgment;

(ii) DENIES Defendants' motion for summary judgment; and

(iii) ENTERS JUDGMENT for Plaintiff Ralph E. Patten, Jr., on the sole Count of the Complaint. The Court DIRECTS Defendants Signator Insurance Agency, Inc., Signator Investors, Inc., and John Hancock Life Insurance Company to SUBMIT to ARBITRATION, as provided for in the Mutual Agreement to Arbitrate Claims.

Each side is to bear its own costs. The CLERK is DIRECTED to CLOSE the CASE.

It is so ORDERED this 5th day of November 2002.

/s/ Benson Legg
Benson Everett Legg
Unites States District Judge

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 05-1148
CA-02-1745-BEL

RALPH F. PATTEN Jr.

Plaintiff-Appellant

v.

SIGNATOR INSURANCE AGENCY, INCORPORATED; SIGNATORS INVESTORS, INCORPORATED; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

Defendants-Appellees

[Filed April 11, 2006]

On Petition for Rehearing and Rehearing En Banc

The appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Luttig, and Judge King.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX J

Federal Arbitration Act, 9 U.S.C. §§ 2, 9, 10 & 11 (2000 & Supp. 2002)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse

party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

APPENDIX K

Labor Management Relations Act
§ 203(d), 29 U.S.C. § 173(d) (2000)

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

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§ 301(a), 29 U.S.C. § 185(a) (2000)

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

RALPH F. PATTEN, JR.,
4110 N. River Street,
McLean, VA. 22101

Plaintiff,

v.

SIGNATOR INSURANCE AGENCY, INC.
John Hancock Place,
P.O. Box 111
Boston, MA. 02117

Serve: The Corporation Trust, Inc.
300 E. Lombard Street,
Baltimore, MD. 21202

and

SIGNATOR INVESTORS, INC.
John Hancock Place,
P.O. Box 111
Boston, MA. 02117

Serve: The Corporation Trust, Inc.
300 E. Lombard Street,
Baltimore, MD. 21202

and

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
John Hancock Place,
P.O. Box 111
Boston, MA. 02117

Civil Action No.
L02CV1745

COMPLAINT FOR ENFORCEMENT OF ARBITRATION

[Filed May 20, 2002]

Serve: The Corporation Trust, Inc.)
300 E. Lombard Street,)
Baltimore, MD. 21202)
)
Defendants.)
)

COMES NOW, Plaintiff, Ralph F. Patten, Jr., and complains against Defendants, Signator Insurance Agency, Inc., Signator Investors, Inc. and John Hancock Mutual Life Insurance Company (collectively, "John Hancock"), as follows.

Parties

1. Defendant John Hancock Mutual Life Insurance Company is a financial services company that sells insurance, annuities and other investment products. Its principal offices are located in Boston, Massachusetts.

2. Defendant Signator Insurance Agency, Inc. is an affiliate of the John Hancock Mutual Life Insurance Company. It is a financial services company in the business of selling insurance, annuities and other investment products. Its principal offices are located in Boston, Massachusetts.

3. Defendant Signator Investors, Inc. is organized under the laws of Delaware. Signator Investors, Inc. is affiliated with the John Hancock Mutual Life Insurance Company and the Signator Insurance Agency, Inc. Its principal offices are located in Boston, Massachusetts.

4. Plaintiff, Ralph F. Patten, Jr., is a resident of the State of Virginia.

Jurisdiction

5. This is a civil action involving, exclusive of interest and costs, the sum of $75,000. Every issue of law and fact in this action is wholly between citizens of different states. The Court has jurisdiction over this controversy pursuant to 28 U.S.C. §1332(a). Also, as this matter involves the enforcement of certain arbitration agreements, the Court has jurisdiction pursuant to the Federal Arbitration Act (9 U.S.C. §1 *et seq.*).

Facts

6. Patten was associated with John Hancock for almost thirty (30) years. He began his career as an insurance agent with the company in 1972. In 1989, John Hancock appointed Patten to the position of a General Agent and Branch Manager. Twelve (12) years later, on January 2, 2001, John Hancock unilaterally terminated Patten.

7. The purported reason for Patten's termination was a "violation of internal policies regarding payment of premiums on insurance and variable products." Patten had paid an insurance premium on behalf of a long-term client, who was temporarily indisposed, in order to protect the client's insurability. As John Hancock is aware, this is a commonly accepted practice among the company's General Agents. John Hancock exercised bad faith in selectively enforcing the company's policies against Patten in furtherance of an illegal and discriminatory purpose.

8. Patten's minor violation of an internal policy of John Hancock was used as a pretext for terminating him as a General Agent and Branch Manager. Patten was fifty-one (51) years old when terminated. John Hancock replaced

Patten as its General Agent and Branch Manager with an individual who lacked managerial experience and is considerably younger than Patten.

9. John Hancock's arbitrary enforcement of its policies, and its bad faith in wrongfully terminating Patten, is apparent from the fact that an individual from the company's Compliance Review Department, which is responsible for investigating infractions of internal policy, escalated the charges against Patten only after Patten refused that individual's request for the payment of a "kick-back". Patten's allegations in this regard are set forth in greater detail in his attached affidavit of March 7, 2002, which was submitted to John Hancock as a supplement to Patten's arbitration demand (Exhibit A).

10. Initially, John Hancock was placed on notice of Patten's claims by his attorney, Michael L. Zimmerman, by letter of August 2, 2001 (Exhibit B). That notice reads in relevant part: "It is my belief after reviewing the documentation provided to me by Mr. Patten that Mr. Patten was wrongfully terminated by John Hancock and clearly discriminated against. The conduct alleged of Mr. Patten ... was clearly conduct performed by most if not all of John Hancock's general agents. To select Mr. Patten for discipline while ignoring the actions of other general agents, is discrimination. It would appear that Mr. Patten has been discriminated against partially because of his age" (Exhibit B). Another notice and demand for arbitration, further specifying claims of unlawful discrimination, wrongful termination, breach of contract and breach of the implied covenant of good faith and fair dealing, was submitted to John Hancock on February 15, 2002 (Exhibit C). This was later supplemented by Patten's affidavit of March 7, 2001 (Exhibit A). Finally, on March 29, 2002, John Hancock was

served with a notice of default as required by the Federal Arbitration Act (9 U.S.C. §4) (Exhibit D).

11. Patten's demand for arbitration of the claims set forth above is based on two (2) arbitration agreements with John Hancock. On July 31, 1992, a Mutual Agreement to Arbitrate Claims (the "Mutual Agreement") was entered into (Exhibit E). The Mutual Agreement covers all claims between the parties, "whether or not arising out of . . . [the] . . . General Agency (or its termination) . . . " (Exhibit E). It requires the aggrieved party to provide written notice of a claim within one (1) year of the event giving rise to the claim (Exhibit E). The notice letter of August 2, 2001 (Exhibit B), meets the Mutual Agreement's notice requirements as it was submitted within a year of Patten's termination on January 2, 2001, and it "identifi[ies] and describes the nature of all claims asserted" (Exhibit B). Subsequently, in 1998, Patten entered into a Management Agreement with John Hancock's securities division (Exhibit F). Patten performed and received benefits under the Management Agreement as a Branch Manager until the time of his termination in 2001. The mandatory arbitration provision in the Management Agreement covers all of the claims set forth above (Exhibit F, ¶ 11). No notice of claim requirement is established in the Management Agreement.

COUNT I

(Enforcement of Arbitration Agreements)

12. Patten restates and realleges the allegations of paragraphs 1 through 11, as if set forth herein.

13. The Mutual Agreement and Management Agreement were entered into by Patten and John Hancock.

Thereunder, it was agreed to settle by arbitration any dispute or controversy arising between the parties.

14. Patten has made written demands to proceed to arbitration in the manner provided in the agreements based on the following claims: (1) unlawful discrimination in violation of the civil rights laws of the United States, Massachusetts and Maryland; (2) wrongful termination of an employment relationship; (3) breach of contract; and (4) breach of the implied covenant of good faith and fair dealing.

15. John Hancock refuses to arbitrate Patten's claims as required under the agreements.

WHEREFORE, Patten prays that this Court issue an Order requiring John Hancock to: (1) arbitrate Patten's claims in the manner provided in the agreements; (2) reimburse Patten for his costs and attorney fees in bringing this action; and (3) such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/ John M. Shoreman

John M. Shoreman
McFADDEN & SHOREMAN, P.C.
1900 L Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 638-2100

Attorneys for Plaintiff

Exhibit A

McFADDEN & SHOREMAN, P.C.
ATTORNEYS AT LAW

1730 K. STREET, N.W.
SUITE 1000
WASHINGTON, DC. 20006
TELEPHONE (202) 638-2100
TELECOPIER (202) 638-6783

[Names Omitted in Printing]

March 7, 2002

VIA FAX TRANSMISSION & CERTIFIED MAIL
Robert Watts, Esq.
Philip A. Huvos, Esq.
Grant David Ward, Esq.
John Hancock Financial Services
John Hancock Place
P.O. Box 111
Boston, MA. 02117

Re: Ralph F. Patten, Jr.

Dear Counsel:

Mr. Patten's demand for arbitration is hereby supplemented by the enclosed Affidavit. All issues, facts and circumstances raised in the Affidavit are submitted for arbitration. Please advise whether John Hancock will accede to arbitration by no later than March 15, 2002.

Yours sincerely,

/s/ John M. Shoreman
John M. Shoreman
Counsel for Ralph F. Patten, Jr.

Enc.
cc: Ralph F. Patten, Jr.

AFFIDAVIT OF RALPH F. PATTEN, JR.

COMMONWEALTH OF VIRGINIA)
ss):

I, Ralph F. Patten, Jr., hereby swear and affirm that all facts set forth in the paragraphs below are true and accurate.

1. I was associated with the John Hancock Mutual Life Insurance Company and its affiliates (hereinafter, the "Company") from 1972 until unilaterally terminated on January 2, 2001. From 1989 until my termination I served as a General Agent and Branch Manager for the Company.

2. The purported reason for my termination by the Company was "violation of internal policies regarding payment of premiums on insurance and variable products." The alleged violation was my payment of an insurance premium on behalf of a client who was temporarily indisposed in order to protect the client's insurability. On rare occasions I paid initial premiums for three reasons: (1) to ameliorate an agent's cash-flow problems; (2) to enhance production for the Company; and (3) to qualify an agent under a Company bonus plan. In most cases the insured reimbursed my Agency. This a commonly accepted practice among the Company's General Agents. I was 51 years of age at the time of my termination. The Company replaced me with a substantially younger individual who lacked any management experience

whatsoever. The Company used a minor violation of its internal policies as a pretext to terminate my long-standing General Agency.

3. The Company's bad faith is [sic] this regard is evident from the compliance review that commenced on August 7, 200C, and was conducted by Paul Weiss of the Department of Special Activities (hereinafter, the "DSA"). The review initially focused on the payment of a premium on behalf of a client, Robert Duff. In the course of that review the business practices of R. Randal Seal, an agent under my supervision, came under scrutiny. Seal was investigated on suspicion of forgery and other irregularities involving address changes and policy delivery procedures. I cooperated fully in DSA's review. In October, 2000, I provided DSA with personal bank activity records going back three (3) years. Weiss raised questions about a premium payment made by my Agency on behalf of one of Seal's client's in December, 1999. As I explained to Weiss, the payment was made to save Seal's contract with the Company, and that it was endorsed by Denis Reyons, Field Vice President. On or about November 14, 2000, I attended a meeting with William Englehart of DSA and Seal at my Agency offices. The meeting quickly became acrimonious as Englehart questioned Seal on his business practices. Seal denied all accusations made against him. Seal left the meeting, but I stayed and continued to defend him in further talks with Englehart. Englehart represented that he would prepare a final

report on the matter and stated: "I can make it good or bad. Hopefully this will work out and you can take care of me." I had no doubt that Englehart was requesting a kick-back in order to clear Seal and myself in the final report. I have no doubt because the same situation arose five (5) of six (6) years earlier in another DSA investigation conducted at my Agency by Paul Weiss. That involved complaints of illegal sales practices made by a client, Robert Basil, against a former agent named Edward Gramm. Basil was eventually made whole by the Company and Gramm was replaced as issuing agent by Jim Wehr. Wehr earned substantial commissions in replacing Basil's coverages, at which point Weiss demanded and received a kick-back from Wehr in the range of $2,000 to $3,000. I was unaware of Weiss' demand and payment until the incident was reported to me by Wehr after the fact. I declined to make a similar kick-back in the later DSA compliance review. And, thereafter, the DSA investigation was focused on my conduct.

4. The DSA and Office of Business Conduct (the "OBC") ultimately presented evidence to the Compliance Review Group from which the latter concluded that I had destroyed documentation concerning my personal bank account in order to hinder the investigation. That conclusion has absolutely no basis in truth. As stated, I provided copies of all bank records going back three (3) years, as requested during the investigation. The very accusation that I destroyed relevant documents shows that DSA and OBC fabricated the case against me.

5. My initial termination date was December 14, 2000. On December 18, 2000, Seal asked me to sign a Suitability Replacement form for a client named Halpin. I informed him at that time that I could no longer sign as a principal on behalf of the Company. Nevertheless, I believe the form was back-dated to December 13 and submitted over my forged signature. The Company's complete disregard for Agent Seal's misbehavior, while terminating my 30-year career on the basis of trumped-up, minor charges, demonstrates a pattern of discrimination and bad faith.

Further affiant sayeth not. Sworn to this 7th day of March 2002.

/s/ Ralph F. Patten, Jr.
Ralph F. Patten, Jr.

Sworn to before me this 7 day of March 2002. [SEAL]

[/s/ Jennifer McFuler] /s/ Jennifer McFuler
Notary Public
My Commission expires:
8-31-05

Exhibit B

LAW OFFICES
Brault Palmer Grove Zimmerman
White & Steinhilber LLP
10533 MAIN STREET
P.O. BOX 1010
FAIRFAX, VIRGINIA 22030-1010

—

(703) 273-6400
FAX (703) 273-3514

[Names and Addresses Omitted in Printing]

August 2, 2001

Grant David Ward, Esquire
John Hancock Financial Services, Inc.
John Hancock Place
P.O. Box 111
T-31
Boston, MA 02117

Re: My client: Ralph Patten

Dear Mr. Ward:

Please be advised that our firm has been retained to represent Ralph Patten regarding his letter of termination dated December 13, 2000. It is my belief after reviewing the documentation provided to me by Mr. Patten that Mr. Patten was wrongfully terminated by John Hancock and clearly discriminated against. The conduct alleged of Mr. Patten, without agreeing that it actually did occur, was clearly conduct performed by most if not all of John Hancock's general agents. To select Mr. Patten for discipline while ignoring the actions of other general agents, is discrimination. It would appear, that Mr. Patten has been discriminated against partially because of his age.

If Mr. Patten did commit any acts of misconduct, these were done with the knowledge of John Hancock and had been previously condoned by John Hancock.

Our firm is in the process of preparing a lawsuit to be filed on behalf of Mr. Patten. However, I am always willing to discuss a peaceful resolution of a dispute without the necessity of rushing to the Courthouse. Accordingly, it would be most appreciated if you would have the appropriate person contact me if you are interested in a peaceful resolution of the matter. I will be out of town on vacation until the 27th of August and will have my file diaried for September 3, 2001. If I do not hear from John Hancock by that date, I will assume that you are not interested in resolving the matter and I will proceed with whatever course Mr. Patten directs me to take.

Thank you for your kind attention to the above matter.

Sincerely,

/s/

Michael L. Zimmerman

MLZ/rcy
cc: Mr. Ralph F. Patten, Jr.

Exhibit C

McFADDEN & SHOREMAN, P.C.
ATTORNEYS AT LAW

1730 K. STREET, N.W.
SUITE 1000
WASHINGTON, DC. 20006
TELEPHONE (202) 638-2100
TELECOPIER (202) 638-6783

[Names Omitted in Printing]

February 15, 2002

VIA FAX TRANSMISSION & CERTIFIED MAIL
Philip A. Huvos, Esq.
Grant David Ward, Esq.
John Hancock Financial Services
John Hancock Place
P.O. Box 111
Boston, MA. 02117

Re: Ralph F. Patten, Jr.

DEMAND FOR ARBITRATION

Dear Counsel:

This firm represents Ralph F. Patten, Jr. We hereby demand arbitration of the claims set forth below against John Hancock Mutual Life Insurance Company; Signator Insurance Agency, Inc.; and, Signator Investors, Inc. (collectively, the "Company"). These claims arise from Mr. Patten's former position as a General Agent and Branch Manager of the Company.

1. Unlawful discrimination in violation of the civil rights laws of the United States;

2. Unlawful discrimination in violation of the civil rights laws of the Commonwealth of Massachusetts;

3. Unlawful discrimination in violation of the civil rights laws of the State of Maryland;

4. Wrongful termination of the employment relationship(s);

5. Breach of contract(s);

6. Breach of the implied covenant(s) of good faith and fair dealing.

Mr. Patten reserves his right to submit additional claims prior to the hearing in this matter. We look forward to the Company's timely response.

Yours sincerely,

/s/ John M. Shoreman
John M. Shoreman

cc: Ralph Patten

Exhibit D

McFADDEN & SHOREMAN, P.C.
ATTORNEYS AT LAW

1730 K. STREET, N.W.
SUITE 1000
WASHINGTON, DC. 20006
TELEPHONE (202) 638-2100
TELECOPIER (202) 638-6783

[Names Omitted in Printing]

March 29, 2002

VIA FAX TRANSMISSION & CERTIFIED MAIL
Senior Vice President
General Agency Department
John Hancock Financial Services, Inc.
John Hancock Place
P.O. Box 111
Boston, MA. 02117

Re: Ralph Patten, Jr.

Dear Sir/Madam:

Please accept this letter as notice of default as required by 9 U.S.C. §4. Within five (5) days of the date of this letter, Mr. Patten shall petition to enforce an arbitration of the claims he has raised against John Hancock Mutual Life Insurance Company; Signator Insurance Agency, Inc.; and, Signator Investors, Inc.

Yours sincerely,
McFADDEN & SHOREMAN, P.C.

/s/ John M. Shoreman
John M. Shoreman
Attorneys for Ralph Patten, Jr.

Cc: Philip A. Huvos, Esq.

Exhibit E

MUTUAL AGREEMENT TO ARBITRATE CLAIMS

I recognize that differences may arise between the John Hancock Mutual Life Insurance Company (the "Company") and me during or following the term of my General Agent Contract with the Company. I understand and agree that by entering into this Agreement to Arbitrate Claims ("Agreement"), I anticipate gaining the benefits of a speedy, impartial dispute-resolution procedure.

I understand that any reference in this Agreement to the Company will be a reference also to all subsidiary and affiliated entities, all benefit plans, the benefit plans' sponsors, fiduciaries, administrators, affiliates, and all successors and assigns of any of them.

Claims Covered by the Agreement

The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), whether or not arising out of my General Agency (or its termination), that the Company may have against me or that I may have against the Company or against its officers, employees or agents in their capacity as such or otherwise. The claims covered by this Agreement include, but are not limited to claims for commissions or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to, race, sex, religion, national origin, age, marital status, or medical condition, handicap or disability); claims for benefits (except where a benefit or pension plan specifies that its claims procedure shall culminate in an arbitration procedure

different from this one), and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, except claims excluded in the following paragraph.

Claims Not Covered by the Agreement

Claims I may have for workers' compensation or unemployment compensation benefits are not covered by this Agreement.

Also not covered are claims by the company for injunctive and/or other equitable relief for unfair competition including, but not limited to any violation of the competition provisions of the General Agent Contract ("contract") and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which I understand and agree that the Company may seek and obtain relief from a court of competent jurisdiction.

Required Notice of all Claims and Statute of Limitations

The Company and I agree that the aggrieved party must give written notice of any claim to the other party within one (1) year of the date the aggrieved party first has knowledge of the event giving rise to the claim; otherwise the claim shall be void and deemed waived even if there is a federal or state statute of limitations which would have given more time to pursue the claim.

Written notice to the Company, or its officers, directors, employees or agents, shall be sent to its Senior Vice President, General Agency Department, P.O. Box 111, Boston, MA 02117. I will be given written notice at the last known business address or other address I have designated.

The written notice shall identify and describe the nature of all claims asserted and the facts upon which such claims are based. The notice shall be sent to the other party by certified or registered mail, return receipt requested.

Discovery

Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. Each party also shall have the right to propound requests for production of documents to any party. The subpoena right specified below shall be applicable to discovery pursuant to this paragraph. Additional discovery may be had only where the Arbitrator selected prusuant [sic] to this Agreement so orders, upon a showing of substantial need.

Designation of Witnesses

At least 30 days before the arbitration, the parties must exchange lists of witnesses, including any expert, and copies of all exhibits intended to be used at the arbitration.

Subpoenas

Each party shall have the right to subpoena witnesses and documents for the arbitration.

Arbitration Procedures

The Company and I agree that, except as provided in this Agreement, any arbitration shall be in accordance

with the Model Employment Arbitration Procedures of the American Arbitration Association ("AAA") before an arbitrator who is licensed to practice law in the state in which the arbitration is convened ("the Arbitrator"). The arbitration shall take place in or near the city in which I am or was last under contract as General Agent of the Company.

The Arbitrator shall be selected by alternative striking from a list of 11 arbitrators drawn by the AAA from its panel of labor and employment arbitrators.

The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable. The arbitration shall be final and binding upon the parties.

The Arbitrator shall have the authority to entertain a motion to dismiss and/or a motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedure.

Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of proceedings.

Either party, upon request at the close of hearing, shall be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the Arbitrator.

Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award. Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination) in any way related to any claim covered by this Agreement.

The Arbitrator shall render an award and opinion in the form typically rendered in labor arbitrations.

Arbitration Fees and Costs

The Company and I shall equally share the fees and costs of the Arbitrator. Each party shall pay for its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim which affords the prevailing party attorneys' fees, or if there is a written agreement providing for fees, the Arbitrator may award reasonable fees to the prevailing party.

Interstate Commerce

I understand and agree that the Company is engaged in transactions involving interstate commerce and that my General Agent Contract involves such commerce.

Requirements for Modification or Revocation

This Agreement to arbitrate shall survive the termination of my General Agent Contract. It can only be revoked or modified by a writing signed by the parties which specifically states an intent to revoke or modify this Agreement.

Sole and Entire Agreement

This is the complete agreement of the parties on the subject of arbitration of disputes (except for any arbitration agreement in connection with any pension or benefit plan). This Agreement supersedes any prior or contemporaneous oral or written understanding on the subject. No party is relying on any representations, oral or written, on the subject of the effect, enforceability or meaning of this Agreement, except as specifically set forth in this Agreement.

Construction

If any provision of this Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement.

Consideration

The promises by the Company and by me to arbitrate differences, rather than litigate them before courts or other bodies, provide consideration for each other.

Not an Employment Agreement

This Agreement is not, and shall not be construed to create, any contract of employment, express or implied. Nor does this Agreement in any way alter the status of my General Agent Contract which is terminable at will.

Voluntary Agreement

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS

TERM, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THE AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF.

I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO.

Executed in duplicate this 31st day of July, 1992.

JOHN HANCOCK MUTUAL
LIFE INSURANCE COMPANY

/s/ J. Paul McDonald
Signature of Senior Vice President

GENERAL AGENT

/s/ Ralph F. Patten, Jr.
Signature of General Agent

RALPH F. PATTEN, JR.
Print Name of General Agent

Exhibit F

SIGNATOR

FINANCIAL NETWORK

Signator Investors, Inc.

Management Agreement

Name Ralph Patten

Agency Washington Patten Ord. Code 171

Registered Rep. Number 071572

MANAGEMENT AGREEMENT
SIGNATOR INVESTORS, INC.

Signator Investors, Inc., a Delaware corporation with its Home Office in Boston, Massachusetts, hereinafter called "Signator", and (Branch Manager name) Ralph F. Patten, Jr., currently of (home address) 4110 N. River St., hereinafter called "Branch Manager", in consideration of the terms and considerations set forth in this Management Agreement ("Agreement") or otherwise made a part hereof, do mutually agree as follows:

1. **AUTHORIZATION**. Signator hereby appoints Branch Manager (he/she) as a management representative of Signator and an affiliated insurance agency, Signator Insurance Agency, Inc., authorized to function as part of its supervisory system exercising responsibility over its securities, investment advisor and insurance businesses. Signator authorizes Branch Manager to exercise designated supervisory functions as its management representative for the branch office noted at the end of this agreement. This responsibility to supervise extends to registered

representatives physically working out of the branch office and to registered representatives assigned to the branch office but maintaining a work location elsewhere. This authorization to supervise is limited to only those securities, investment advisor or insurance products and services which Signator or its affiliated insurance agency are allowed to offer, including, but not limited to, mutual funds, variable life insurance, variable annuities, limited partnerships, unit investment trusts, general securities and investment advisor products and services, including fee-based financial plans and advice, wrap accounts and investment seminars for fees.

Signator also hereby authorizes Branch Manager, as an independent contractor and registered representative, to represent Signator in conducting its securities business and to offer for sale those products which Signator is authorized to offer. Signator reserves the right, from time to time at its discretion, to limit the offering and sale of certain securities to certain of its representatives. Solicitations shall be made only within the jurisdiction in which products are registered and/or qualified for sale and in which Signator and the Branch Manager are qualified to do business in accordance with licensing requirements and other applicable Federal and state laws, industry rules or regulations. Unless specifically authorized by Signator, Branch Manager is not authorized to act for Signator in the final acceptance of any application or transaction for purchase or sale of securities; rather, applications and transactions shall be accepted only by Signator at its Home Office and any other place it may designate for this responsibility.

The supervisory responsibilities assigned to the Branch Manager represent only those responsibilities appropriately assigned to the Branch Manager in a manner consistent with the Company's supervisory system designed to meet required standards outlined in federal and state laws and NASD rules. Branch Manager is also a duly authorized General Agent or Affiliated General Agent of Signator Insurance Agency, Inc., an affiliate of John Hancock Mutual Life Insurance Company and must abide by all contract provisions and responsibilities he/she assumes as a General Agent or Affiliated General Agent.

2. **RELATIONSHIP**. For employment purposes, the relationship of Branch Manager to Signator is that of an independent contractor and nothing contained herein shall be construed to create an employer and employee relationship between Branch Manager and Signator, nor between Branch Manager and any issuer or sponsor of securities, investment advisor or insurance products/services. Branch Manager shall exercise his/her own judgment in carrying out his/her supervisory responsibilities as a management representative of Signator as long as minimum supervisory procedures outlined in the John Hancock/Signator "Market Conduct Manual" and any updates to the "Market Conduct Manual" are followed. When permitted by Signator, certain supervisory tasks may be delegated to other persons in the office; however, final responsibility for supervision over branch office matters rests with the Branch Manager.

Branch Manager must notify Signator in writing in the event Branch Manager contemplates entering into a private securities transaction as defined in Rule 3040 of the Conduct Rules

of the NASD. Signator will notify Branch Manager in writing that Signator approves or disapproves of the private securities transaction prior to Branch Manager's participation in such transaction. Furthermore, in the event Signator disapproves of the transaction, the Branch Manager shall not participate in the transaction in any manner, directly or indirectly.

Branch Manager must notify Signator in writing prior to engaging in any outside business activity as defined in Signator's "Market Conduct Manual". Signator reserves the right to restrict the Branch Manager's participation in any outside business activity. Branch Manager also agrees to comply with and be bound by the continuing education requirements established by Signator including, but not limited to, attendance at training and compliance-related seminars.

In addition to the foregoing, Branch Manager agrees to become thoroughly knowledgeable, and to comply in all aspects, with the provisions of the John Hancock/Signator "Market Conduct Manual", including the sections of the "Manual" devoted to supervisory responsibilities. Branch Manager agrees to promptly update this publication upon receipt of periodic updates from Signator.

3. **LICENSING/REGISTRATION**. The Branch Manager shall be properly registered with Signator as a NASD General Securities Principal (Series 24) and have passed the Uniform Securities Agent State Law Examination (Series 63) within three months of appointment as a General Agent/Affiliated General Agent of Signator Insurance Agency, Inc., by passing the appropriate

examinations.* The Branch Manager is also required to pass the Uniform Investment Advisor Law Examination (Series 65) or the Uniform Combined State Law Examination (Series 66) within four months of appointment as a Branch Manager.

*General Agents and affiliated General Agents who act as Branch Managers and who have been affiliated with John Hancock prior to November, 1998 must be registered with Signator as a General Securities Principal (Series 24) prior to March 31, 1999.

4. **GENERAL POWERS AND DUTIES.** The Branch Manager shall endeavor to promote the interests of Signator as contemplated by this contract, and shall carry out his/her duties and responsibilities so as not to affect adversely the business, good standing or reputation of Signator. The Branch Manager shall have no power or authority other than herein expressly granted, and no other or greater power or authority shall be implied by the grant or denial of power or authority specifically mentioned herein. The Branch Manager shall have no power or authority on behalf of Signator to issue, make or discharge any policy, contract, obligation or indebtedness whatsoever.

5. **SOLICITATION OF BUSINESS.** The Branch Manager shall have authority to solicit business for Signator personally and by registered representatives assigned to the branch office under the terms and conditions outlined in this agreement and policies and procedures detailed in the John Hancock/Signator "Market Conduct Manual" and related publications. When acting as a registered representative personally

soliciting clients for Signator, the Branch Manager agrees to the terms and conditions, including compensation schedules and commission forfeiture, outlined in the Signator Sales Representative's Agreement attached as an amendment to this agreement. Commissions and fees payable to Branch Manager as a registered representative shall be in accordance with the compensation schedule current at the time of purchase and in any event shall be payable only so long as Branch Manager is duly licensed as a representative of Signator and only to the extent the monies are available to Signator. Signator's commission schedule is subject to change by Signator at any time without notice.

6. **SELECTION OF REGISTERED REPRESENTATIVES**. The Branch Manager shall only recommend qualified persons as candidates for NASD registration with Signator. The Branch Manager shall complete the required background check procedures before presenting any individual's application for registration with Signator. All contracting guidelines included in the John Hancock/Signator "Market Conduct Manual" and related procedures shall be observed including, but not limited to, any restrictions imposed by the Violent Crime Control and Law Enforcement Act of 1994.

7. **OFFICE BOOKS AND RECORDS**. The Branch Manager shall keep, in manner or form prescribed or approved by Signator, required books and records, including proper signage at the branch office. Record retention requirements established by Signator will also be strictly observed. The books and records will be available for inspection by authorized representatives of Signator or its ultimate parent, John Hancock

Mutual Life Insurance Company, who conduct periodic audits of such books and records. The Branch Manager shall submit to Signator and make available to it for examination any records necessary to enable Signator to comply with the laws, rules and regulations of any jurisdiction or self-regulatory body. All books and records required to be maintained at the Branch Manager's office shall be preserved as the property of Signator in accordance with Signator's standards and shall be surrendered to Signator upon termination of this agreement or upon prior request.

8. **SUPERVISORY RESPONSIBILITIES**. The Branch Manager accepts the responsibility to ensure that all persons subject to the Branch Manager's supervision conduct themselves in compliance with the policies and procedures set forth in John Hancock/Signator's "Market Conduct Manual" and in any updates to the Manual. This responsibility extends to whole-time and part-time producers, non-registered personnel, and any other persons who are under contract with the Branch Manager or who are subjected to the Branch Manager's direct or indirect control. Failure by the Branch Manager to fulfill his/her responsibilities as a supervisor for Signator is cause for possible disciplinary action, including termination.

9. **TERMINATION**. This Agreement shall remain in full force and effect until terminated by written notice by the Branch Manager or Signator. This Agreement will be immediately terminated (unless Branch Manager is otherwise notified by Signator) in the event that the Branch Manager should cease to be associated as a General Agent or Affiliated General Agent with Signator Insurance Agency, Inc., or if the Branch

Manager should breach any of the provisions of this Agreement (including, without limitation, failure to comply with applicable laws or Signator's supervisory procedures), or in the event that his/her NASD registration with Signator or qualification under any state securities or insurance laws should be terminated. Any notice of termination by Signator to the Branch Manager shall be sent to the residence address designated in his/her NASD application, which shall be kept current at all times by the Branch Manager. If the Branch Manager terminates this Agreement by written notice to Signator Senior Vice President, General Agency Department, Signator shall concurrently submit to the NASD a notice of termination. This Agreement shall automatically terminate upon the death of the Branch Manager.

10. **INDEMNIFICATION**. Branch Manager agrees to indemnify Signator in the event of any claim, suit, judgment or any liability whatsoever which may be imputed to Signator as a result of any act or omission by Branch Manager which may be construed or considered as negligent, willful, intentional, fraudulent, or criminal, or any violation of Federal and state securities laws, Conduct Rules of the NASD or policies of Signator including, but not limited to, provisions of the John Hancock/Signator "Market Conduct Manual", which may result from the Branch Manager's actions on behalf of Signator during the term of this Agreement or after termination. Branch Manager agrees to cooperate fully with Signator and not impede or hinder any of Signator's responsibilities to supervise Branch Manager, as mandated in Rule 3010 of the NASD Conduct Rules, including the investigation of

customer complaints. Branch Manager may be liable for any losses incurred by Signator in connection with Branch Manager's failure to comply with any law, rule, industry regulation or Signator's policy. Furthermore, Branch Manager agrees not to conceal from Signator any securities sales activities, whether authorized by Signator or not.

11. **MANDATORY ARBITRATION**. Signator and Branch Manager mutually consent to the resolution by arbitration of all claims or controversies ("claims"), whether or not arising out of the Branch Manager's status as a principal or representative of Signator (or Branch Manager's termination), that Signator may have against Branch Manager or that Branch Manager may have against Signator or against its officers, directors, employees or representatives in their capacity as such or otherwise. The claims covered by this consent to arbitration include all claims arising out of or in connection with the business of Signator, including but not limited to the following: claims for commissions or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to, race, sex, religion, national origin, age, marital status or medical condition, handicap or disability); claims for benefits (except where a benefit or pension plan specifies that its claims procedure shall culminate in any arbitration procedure different from this one), and claims for violations of any Federal, state or other governmental law, statute, regulation, or ordinance.

12. **MISCELLANEOUS**. This Agreement supersedes all previous agreements, oral or written, between the parties hereto regarding the

subject matter hereof, and may be amended by written notice to Branch Manager by Signator at any time.

13. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, the parties hereto, on behalf of themselves, their heirs and assigns, have made and executed this Agreement in duplicate as a sealed instrument on ___.

SIGNATOR
INVESTORS, INC.

BRANCH MANAGER

_____ **By:** /s/ Ralph F. Patten

Jason H. Diamond,
President and Chief Operating Officer

Name: RALPH PATTEN

Branch Officer: WASH. D.C.

Ord. Code 171

Attachment:

Signator Sales Representative's Agreement

[Civil Cover Sheet Deleted in Printing]

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND NORTHERN DIVISION

RALPH E. PATTEN, JR.,	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
SIGNATOR INSURANCE AGENCY, INC., et al.,	)	L-02-1745
	)	
	)	
Defendants.	)	

[Filed Jun. 20, 2002]

ANSWER

Signator Insurance Agency, Inc., Signator Investors, Inc., and John Hancock Life Insurance Company [collectively referred herein as "Defendants"] respond as follows to the Plaintiff Ralph F. Patten Jr.'s ("Plaintiff" or "Patten") Complaint:

1. The Defendants admit that John Hancock Mutual Life Insurance Company, now doing business as John Hancock Life Insurance Company ("John Hancock"), is a financial services company and has its principal offices in Boston, Massachusetts, but deny the remaining allegations in paragraph 1 of the Complaint.

2. The Defendants admit that Signator Insurance Agency, Inc. is a financial services company, selling insurance and annuities, with its principal offices in Boston, Massachusetts, but deny the remaining allegations in paragraph 2 of the Complaint.

3. The Defendants admit that the Signator Investors, Inc. is organized under the laws of Delaware, is affiliated with Signator Insurance Agency, Inc., and has its principal offices in Boston, Massachusetts, but deny the remaining allegations in paragraph 3 of the Complaint.

4. The Defendants admit the allegations in paragraph 4 of the Complaint.

5. The Defendants admit that the Court has jurisdiction over this controversy pursuant to 28 U.S.C. § 1332 (a), but deny the remaining allegations in paragraph 5 of the Complaint.

6. The Defendants admit that Plaintiff was associated with John Hancock as an agent and then as a "General Agent," but deny the remaining allegations in paragraph 6 of the Complaint.

7. The Defendants deny the allegations in paragraph 7 of the Complaint.

8. The Defendants deny the allegations in paragraph 8 of the Complaint.

9. The Defendants deny the allegations in paragraph 9 of the Complaint.

10. The Defendants deny the allegations in paragraph 10 of the Complaint.

11. The Defendants deny the allegations in paragraph 11 of the Complaint.

12. The Defendants incorporate by reference each and every answer set forth above in response to the Plaintiff's allegations in paragraphs 1 through 11 of the Complaint.

13. The Defendants deny the allegations in paragraph 13 of the complaint.

14. The Defendants deny the allegations in paragraph 14 of the complaint.

15. The Defendants deny the allegations in paragraph 15 of the Complaint and deny that that Plaintiff is entitled to any of the relief requested in the WHEREFORE clause immediately following paragraph 15 of the Complaint

AFFIRMATIVE DEFENSES

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

The Plaintiff has not properly served all three Defendants.

Third Defense

There is no arbitration agreement among the Plaintiff and the Defendants that covers the Plaintiff's claims.

Fourth Defense

The Plaintiff's claims are not arbitrable because the Plaintiff failed to invoke arbitration in a timely and proper manner.

WHEREFORE, Defendants respectfully request that the Plaintiff take nothing on his Complaint and that the

Complaint be dismissed with prejudice and that the Defendants be awarded their costs and attorneys' fees incurred in defending this action.

/s/ Michael J. Murphy
Michael J. Murphy, Bar No. 22628
OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.
2400 N Street, NW, Fifth Floor
Washington, D.C. 20037
202/887-0855
202/887-0866 (Fax)

COUNSEL FOR DEFENDANTS

DATED: June 19, 2002

[Certificate of Service Deleted in Printing]

APPENDIX N

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND NORTHERN DIVISION

RALPH F. PATTEN, JR., Plaintiff,	)	
v.	)	
SIGNATOR INS. AGENCY, INC., *et al.*, Defendants.	)	Civil Action No. L-02-1745

[Filed Aug. 9, 2002]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, Ralph F. Patten, Jr., by counsel and pursuant Rule 56 of the Federal Rules of Civil Procedure, and moves the Court for summary judgment against Defendants John Hancock Mutual Life Insurance Company, now trading as John Hancock Life Insurance Company; Signator Investors, Inc.; and, Signator Insurance Agency, Inc., as to all issues raised in the Complaint for Enforcement of Arbitration. In support whereof the following is shown.

1. Plaintiff entered into two (2) independent, yet complimentary, arbitration agreements with Defendants.

2. Plaintiff made timely demands to arbitrate claims arising under the arbitration agreements against Defendants.

3. Defendants refuse to arbitrate Plaintiff's claims in breach of the arbitration agreements.

4. Based on the pleadings herein, and on the Affidavit of Ralph F. Patten, Jr., and for the reasons set forth more fully in the attached Memorandum in Support, Plaintiff is entitled to summary judgment against Defendants and an Order of the Court enforcing arbitration of all claims raised by Plaintiff.

5. The form of a proposed Order is attached.

WHEREFORE, Plaintiff prays the Court to grant summary judgment against Defendants and enter an Order enforcing arbitration of all claims raised by Plaintiff.

Dated: August 9, 2002 Respectfully submitted,

/s/ John M. Shoreman
John M. Shoreman
McFadden & Shoreman, P.C.
1900 L Street, N.W., Suite 502
Washington, D.C. 20036
(202) 638-2100

Attorneys for Plaintiff

[Memorandum in Support of Plaintiff's Motion for Summary Judgment Deleted in Printing]

AFFIDAVIT OF RALPH F. PATTEN, JR.

I, Ralph F. Patten, Jr., hereby swear and affirm that all facts set forth in the paragraphs below are true and accurate.

1. I was associated with Defendants John Hancock Mutual Life Insurance Company, now trading as

John Hancock Life Insurance Company (hereinafter "John Hancock"), Signator Investors, Inc. and Signator Insurance Agency, Inc., from 1972 until unilaterally terminated on January 2, 2001. I was appointed as a General Agent of John Hancock in 1989, and served in that capacity until terminated. On July 31, 1992, I entered into a Mutual Agreement to Arbitrate Claims with John Hancock (Exhibit A). That agreement was in effect through the remaining years of my employment with the company.

2. Signator Investors, Inc. and Signator Insurance Agency, Inc. are affiliates of John Hancock. In 1998 Signator Investors, Inc., appointed me as a Management Representative under the terms of a Management Agreement (Exhibit B). Signator Investors, Inc. is a member of the National Association of Securities Dealers ("NASD"), it sells securities and variable life insurance products through representatives licensed by the NASD. I was appointed as a Management Representative of Signator Investors, Inc., due to my status as a General Agent and Principal for John Hancock. Pursuant to the Management Agreement, as a Management Representative of Signator Investors, Inc., I was given management and supervisory authority over the registered representatives of Signator Investors, Inc. who operated from my branch office. I received compensation from Signator Investors, Inc. as a Management Representative under the Management Agreement, the terms of which were in effect at the time of my termination.

3. John Hancock Financial Services, Inc., informed me by letter of December 29, 2000, that my Management Agreement with Signator Investors, Inc. was terminated (Exhibit C). As required under

the Management Agreement, I previously qualified with the NASD as a General Securities Principal (Series 24). Upon termination, Signator Investors, Inc. informed the NASD that my status as a registered representative of the company was terminated through the filing of a Uniform Termination Notice (NASD Form U-5) (Exhibit D).

4. The purported reason for my termination was "violation of internal policies regarding payment of premiums on insurance and variable products." The alleged violation was my payment of an insurance premium on behalf of a client who was temporarily indisposed in order to protect the client's insurability. On rare occasions I paid initial premiums for three reasons: (1) to ameliorate an agent's cash-flow problems; (2) to enhance production for the Company; and (3) to qualify an agent under a company bonus plan. In most cases the insured reimbursed my agency. This a [sic] commonly accepted practice among the [sic] John Hancock's General Agents. I was 51 years of age at the time of termination. The company replaced me with a substantially younger individual who lacked any management experience whatsoever. The company used a minor violation of its internal policies as a pretext to terminate my long-standing position with the company.

5. The company's bad faith is [sic] this regard is evident from the compliance review that commenced on August 7, 2000, and was conducted by Paul Weiss of the Department of Special Activities (hereinafter, the "DSA"). The review initially focused on the payment of a premium on behalf of a client, Robert Duff. In the course of that review the business practices of R. Randal Seal, an

agent under my supervision, came under scrutiny. Seal was investigated on suspicion of forgery and other irregularities involving address changes and policy delivery procedures. I cooperated fully in DSA's review. In October 2000, I provided DSA with personal bank activity records going back three(3) years. Weiss raised questions about a premium payment made by my agency on behalf of one of Seal's clients in December, 1999. As I explained to Weiss, the payment was made to save Seal's contract with the company, and that it was endorsed by Denis Reyons, Field Vice President. On or about November 14, 2000, I attended a meeting with William Englehart of DSA and Seal at my agency offices. The meeting quickly became acrimonious as Englehart questioned Seal on his business practices. Seal denied all accusations made against him. Seal left the meeting, but I stayed and continued to defend him in further talks with Englehart. Englehart represented that he would prepare a final report on the matter and stated: "I can make it good or bad. Hopefully this will work out and you can take care of me." I had no doubt that Englehart was requesting a kick-back in order to clear Seal and myself in the final report. I have no doubt because the same situation arose five(5) of [sic] six(6) years earlier in another DSA investigation conducted at my agency by Paul Weiss. That involved complaints of illegal sales practices made by a client, Robert Basil, against a former agent named Edward Gramm. Basil was eventually made whole by the company and Gramm was replaced as issuing agent by Jim Wehr. Wehr earned substantial commissions in replacing Basil's coverages, at which point Weiss demanded and received a kick-back from Wehr in the range of $2,000 to

$3,000. I was unaware of Weiss' demand and payment until the incident was reported to me by Wehr after the fact. I declined to make a similar kick-back in the later DSA compliance review. And, thereafter, the DSA investigation was focused on my conduct.

6. The DSA and Office of Business Conduct (the "OEC") ultimately presented evidence to the Compliance Review Group from which the latter concluded that I had destroyed documentation concerning my personal bank account in order to hinder the investigation. That conclusion has absolutely no basis in truth. As stated, I provided copies of all bank records going back three(3) years, as requested during the investigation. The very accusation that I destroyed relevant documents shows that DSA, and OBC fabricated the case against me.

7. My initial termination date was December 14, 2000. On December 18, 2000, Seal asked me to sign a Suitability Replacement form for a client named Halpin. I informed him at that time that I could no longer sign as a principal on behalf of the Company. Nevertheless, I believe the form was back-dated to December 13 and submitted over my forged signature. The Company's complete disregard for Agent Seal's misbehavior, while terminating my 30-year career on the basis of trumped-up, minor charges, demonstrates a pattern of discrimination and bad faith.

Further affiant sayeth not. Sworn to this 8th day of August, 2002.

/s/ Ralph F. Patten
Ralph F. Patten, Jr.

[SEAL]

Sworn to before me this 8 day of August, 2002.

/s/ Christine A. Barrale Christine A. Barrale
Notary Public
My Commission expires: 10/24/02

[Exhibits A and B Deleted in Printing]

EXHIBIT C

John Hancock Financial Services, Inc.
Finance Unit
General Agency Department

John Hancock Place
Post Office Box 111
Boston, Massachusetts 02117
(617) 572-6060
Fax: (617) 572-1612
Bstanton@jhancock.com

[LOGO]

Brian P. Stanton
Finance Consultant
December 29, 2000

Memorandum to: James M. Morris, CEO SFN
Joel V. Kamer, CFO SFN
Kevin Crowley, President, SFN
Margaret Skinner,
Senior Vice President, SFN
Kathleen F. Driscoll, Vice President

RE: Washington Patten (171)

The General Agent contract between Signator and Ralph F. Patten Jr, (Man #71572) will be terminated effective

December 31, 2000. Mr. Patten will not continue in personal production.

General Agent Patten operated under the Formula Contract. He is vested for post-termination commissions. Beginning January 2, 2001, post-termination commissions due to GA Patten should be accumulated and transferred monthly by a journal entry warrant to ledger account #2487000, "Commissions – Post Termination Due Formula General Agent" and not paid out. Collection fees generated on business written while Mr. Patten was General Agent should be suppressed and credited to "General Agent's Salvage Overrides", account 5743000, and not paid to a replacement General Agent.

Jamie McGrory (Agent #146628) will be appointed Acting General Agent effective January 2, 2001 and the agency will operate under the Development General Agent's contract. General Agents overrides beginning January 2, 2001 should be suppressed and credited to "General Agent's Salvage Overrides", account 5743000, and not paid out to the General Agent.

Writing agents commissions for the week ending December 29, 2000 should be paid to Acting General Agent McGrory. General Agent Overrides for the week ending December 29, 2000 should be sent by individual wire/check to General Agent Patten.

Please advise the appropriate individuals in your department of this change.

Finance Consultant

EXHIBIT D

FORM U-5
UNIFORM TERMINATION NOTICE
FOR SECURITIES INDUSTRY
REGISTRATION

U5 – FULL TERMINATION

This is a **FULL TERMINATION.** This filing will terminate ALL registrations with all SROs and all jurisdictions.

Date Terminated (mm/dd/yyyy): 01/11/2001
(A complete date of termination is required for full or partial termination. This date represents the actual date that the termination of registration is effective.)

Reason for Termination: *Other*
Provide an explanation below

VIOLATION OF INTERNAL POLICIES REGARDING PAYMENT OF PREMIUMS ON INSURANCE AND VARIABLE PRODUCTS

U5 – GENERAL INFORMATION

First name:	Middle Name:	Last Name:	Suffix JR./SR., etc.:
RALPH	FRANCIS	PATTEN	
Firm CRD#:	**Firm or Issuer Name:**	**CRD Branch#:**	**Firm NFA#:**
468	SIGNATOR INVESTORS, INC.		
Billing Code: (optional)	**Applicant's CRD#:**	**Applicant's SS#:**	**Applicant's NFA#:**
	1046474	218-56-9829	

Office of Employment Street Address 1:		Office of Employment Street Address 2:	
101 HUNTINGTON AVENUE			
City: BOSTON	**State:** Massachusetts	**Country:**	**Zip:** 02199

NOTICE TO THE INDIVIDUAL WHO IS THE SUBJECT OF THIS FILING

As a former registered representative of the firm filing this Form U-5, you are under the continuing jurisdiction of regulators and may have to provide information about your activities while associated with this firm. Forward any residential address changes for two years following your termination date or last Form U-5 amendment to: CRD Address Changes, CRD P.O. Box 9401, Gaithersburg, MD 20898-9401.

U5 – RESIDENTIAL HISTORY

From	To	Street (Do not use a P.O. Box)	City	State	Country	Zip
03/1994	PRESENT	4110 N. RIVER ST.	MCLEAN	VA	UNITED STATES	22101

U5 – AFFILIATED FORMS

Is this a multiple termination with one or more firm(s) under common ownership or control with the filing firm?

If Yes, Please fill in the details to indicate a request for termination with additional firm(s).

○ Yes ⊙ No

U5 – DISCLOSURE QUESTIONS

Investigation Disclosure

	YES	NO
14. Currently is, or at termination was, the individual the subject of an *investigation* or *proceeding* by a domestic or foreign governmental body or *self-regulatory organization* with jurisdiction over *investment-related* businesses?	○	◉

Internal Review Disclosure

	YES	NO
15. Currently is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules or industry standards of conduct?	◉	○

Criminal Disclosure

	YES	NO
16. While employed by or associated with your firm, or in connection with events that occurred while the individual was employed by or associated with your firm, was the individual:		
A. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any *felony*?	○	◉
B. *charged* with any *felony*?	○	◉

C. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	○	◉
D. *charged* with a *misdemeanor* specified in item 16(C)?	○	◉

Regulatory Action Disclosure

	YES	NO
17. While employed by or associated with your firm, or in connection with events that occured [sic] while the individual was employed by or associated with your firm, was the individual *involved* in any *disciplinary* action by a domestic or foreign governmental body or *self regulatory organization* (other than those designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and Exchange Commission) with jurisdiction over the *investment-related* businesses?	○	◉

Customer Complaint Disclosure

	YES	NO
18. A. In connection with events that occured [sic] while the individual was employed by or associated with your firm, was the individual named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil		

litigation which alleged that the individual was *involved* in one or more *sales practice violations* and which:

(1) is still pending, or; ○ ⊙

(2) resulted in an arbitration award or civil judgment against the individual, regardless of amount, or; ○ ⊙

(3) was settled for an amount of $10,000 or more. ○ ⊙

B. In connection with events that occurred while the individual was employed by or associated with your firm, was the individual the subject of an *investment-related*, consumer-initiated complaint, not otherwise reported under question 18A above, which alleged that the individual was *involved* in one or more *sales practice violations*, and which complaint was settled for an amount of $10,000 or more? ○ ⊙

C. In connection with events that occurred while the individual was employed or associated with your firm, was the individual the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under questions 18A or 18B above, which:

(1) would be reportable under question 231(3)(a) on form U-4, if the individual were still employed by your firm, but which has not previously been reported on the individual's Form U-4 by your firm; or ○ ⊙

(2) would be reportable under question 231(3)(b) on Form U-4, if the ○ ⊙

individual were still employed by your firm, but which has not previously been reported on the individual's Form U-4 by your firm.

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in the individual's file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP U-5(s). All appropriate questions in Items 14, 15, 16, 17 or 18 above must be answered, regardless of whether the certification is being utilized. Refer to the Form U-5 instructions for additional information on the utilization of the certification language.

19. This is to certify that details relating to the above answers to items 14, 15, 16, 17 or 18 have been previously reported on amendments to Form U-4 or Form U-5 filed on behalf of this individual. Updated information will be provided, if needed, as it becomes available to the firm. This is to further certify the following:

A. There is no additional information to be reported at this time. ☐

B. There is additional information to disclose that is reported on the appropriate DRP U-5(s). ☐

C. There is updated information, reported on the appropriate DRP U-5(s), relating to disclosures previously reported. ☐

U5 – SIGNATURE PAGE

I VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS FORM

Person to contact for further information CAROLYN STRAKER	**Telephone of person to contact** 617 572 6371
Signature/Name of Appropriate signatory CAROLYN STRAKER **Signature /s/** Carolyn Straker	**Date (mm/dd/yyyy)** 01/05/2001

U5 – INVESTIGATION DRP

U5 – INTERNAL REVIEW DRP

This Disclosure Reporting Page is an [sic] response to report details for affirmative responses to ***Item 15*** of Form U-5;

Check Item(s) being responded to:

Internal Review

☑ **15**

Click here to view question text

Part I

1. Notice Received From: (Name of firm initiating the internal review):
   SIGNATOR INVESTORS, INC.

2. Date Internal review initiated (MM/DD/YYYY):
   09/01/2000 ⊙ **Exact** ○ **Explanation**
   If not exact, provide explanation:

3. Describe briefly the nature of the internal review or details of the conclusion. (The information must fit within the space provided.):

MR. PATTEN ADMITTED THAT ON OCCASION HE PAID CLIENT PREMIUMS WITH PERSONAL FUNDS TO (1) PREVENT POLICIES FROM LAPSING; (2) QUALIFY AGENTS/REGISTERED REPRESENTATIVES FOR BONUSES; AND (3) PREVENT AGENT CONTRACT TERMINATIONS

4. Date Internal review concluded (MM/DD/YYYY):

12/12/2000 ◉ **Exact** ○ **Explanation**

If not exact, provide explanation:

Part II

INDIVIDUAL SUBJECT MAY USE THIS SPACE FOR DETAILS TO AFFIRMATIVE ANSWERS OF ITEM 15 ONLY

The individual who is the subject of the internal review may provide a brief summary of this event. The summary must fit within the space provided below. This summary may be submitted electronically to the CRD by the terminating firm or may be sent to: CRD, P.O. Box 9401 Gaithersburg, MD 20898-9401

U5 – CRIMINAL DRP

U5 – REGULATORY ACTION DRP

U5 – CUSTOMER COMPLAINT DRP

[Order and Certificate of Service Deleted in Printing]

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND NORTHERN DIVISION

RALPH E. PATTEN, JR., Plaintiff, v. SIGNATOR INSURANCE AGENCY, INC., et al., Defendants.	)	CIVIL ACTION NO. L-02-1745

[Filed Aug. 26, 2002]

DEFENDANTS' CROSS MOTION
FOR SUMMARY JUDGMENT

Defendants hereby move, pursuant to Federal Rule of Civil Procedure 56(b), for summary judgment dismissing Plaintiff's complaint seeking an order compelling arbitration. For the reasons set forth in the accompanying Memorandum of Law, the Defendants submit that there are no genuine issues of material fact and that the Defendants are entitled to the entry of summary judgment in their favor as a matter of law.

Respectfully submitted,

/s/ Michael J. Murphy

Michael J. Murphy, Bar No. 22628
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2400 N Street, N.W.
Fifth Floor
Washington, D.C. 20037
(202) 887-0855
Counsel for Defendants

Dated: August 26, 2002

[Defendants' Memorandum of Law in Opposition to the Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross Motion for Summary Judgment Deleted in Printing]

[Order and Certificate of Service Deleted in Printing]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANN O'BRIEN PAPPAS, Plaintiff, vs. JOHN HANCOCK LIFE INSURANCE COMPANY and RALPH PATTEN, JR., Defendants.	)	Civil Action No. 00-1389-A

Springfield, Virginia

Thursday, January 18, 2001

Deposition of RALPH F. PATTEN, JR., called for examination by counsel for the plaintiff, pursuant to notice, at the offices of Declan C. Leonard, Esq., Martin, Arif, Petrovich & Walsh, 8001 Braddock Road, Suite 105, Springfield, Virginia, before Karen Stuck Arnold, a notary public in and for the State of Virginia, beginning at 9:00

a.m., when were present on behalf of the respective parties:

FOR THE PLAINTIFF:

DECLAN C. LEONARD, ESQ., Martin, Arif, Petrovich & Walsh, 8001 Braddock Road, Suite 105, Springfield, Virginia 22151

[2] FOR THE DEFENDANT JOHN HANCOCK LIFE INSURANCE COMPANY:

MICHAEL J. MURPHY, Ogletree, Deakins, Nash, Smoak & Stewart, 2400 N Street, N.W., Fifth Floor, Washington, D.C. 20037

FOR THE DEFENDANT RALPH PATTEN, JR.:

MICHAEL L. ZIMMERMAN, ESQ., Brault, Palmer, Grove, Zimmerman, White & Steinhilber, 10533 Main Street, P.O. Box 1010, Fairfax, Virginia 22030-1010

ALSO PRESENT:

Ann O'Brien Pappas

* * *

[5] PROCEEDINGS

Whereupon,

RALPH F. PATTEN, JR.,

defendant, was called for examination by counsel for the plaintiff, and after having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. LEONARD:

Q Okay, would you begin by stating your name.

A Ralph Francis Patten, Jr.

Q Do you reside in Maryland or Virginia?

A Virginia.

Q What is your address?

A 4110 North River Street, McLean, Virginia.

Q Mr. Patten, have you ever been deposed before?

A No.

Q In any context, whatsoever?

A No.

Q Have you ever testified at trial before?

A No, I haven't.

Q Okay. Basically, what is going to happen – and they may have explained it to you already – is [6] I'll be asking questions, and the court reporter is taking down my questions as well as your answers, so I guess there are a couple of things that are important. First of all, as Mr. Zimmerman indicated, you've got to give verbal responses so she can get that on the record. Make sure when I'm asking a question, even if you anticipate what I'm asking you, just let me finish the question before you answer, and then it flows nicely for the court reporter. I'll try not to talk over you also, as best I can.

Okay, are you on any kind of medications this morning or anything?

A High blood pressure. Corgard.

Q Is that something that would affect your ability to give answers today?

A No.

Q Okay, let's start off with your educational background. Where did you go to college?

A Spring Hill Jesuit College in Mobile, Alabama. I went to high school at Gonzaga in Washington.

Q A rival of O'Connell High School. And any other education besides?

[7] A No. I graduated from Spring Hill.

Q What was your degree in?

A B.S. in business.

Q Okay. And then what year was that that you graduated?

A '72.

Q 1972. And then what did you do after your graduation?

A Joined The John Hancock.

Q Oh, you started right after?

A Yes.

Q And in what capacity did you start?

A Agent.

Q I'm sorry, as a sales agent or a general agent?

A Sales agent.

Q Okay. And who was that with?

A W. Arthur Bingham in Silver Spring.

Q Silver Spring, Maryland?

A Uh-huh.

Q And that was in 1972?

A Uh-huh (witness moves head up and down).

[8] THE REPORTER: Is that a yes? Rather than uh-huh or uh-uh, if you could say yes or no.

THE WITNESS: Okay.

BY MR. LEONARD:

Q And how long were you with the Bingham Agency in Silver Spring?

A Eight years.

Q And in that capacity as a sales agent?

A And sales manager.

Q Okay. And then where did you go from there?

A Down to the Washington Corey Agency in 1980.

Q Why did you leave the Bingham Agency?

A Opportunity.

Q Explain what you mean.

A I was offered an opportunity to develop a much larger agency with Neil Corey, who ended up being my father-in-law, back in 1980.

Q Okay. And –

A Opportunity.

Q So your position would not have been just sales agent with Washington Corey; is that correct?

A I was a sales manager with the Bingham Agency [9] in the seventies. I made a transfer down to the Washington agency for a better opportunity with the same title.

Q Okay. And these positions, when you got to the Corey Agency especially, were you doing mostly managerial duties?

A Yeah, managerial.

Q Okay. So you weren't necessarily doing hands-on selling of insurance?

A I was, but pretty much the priority was developing a unit, manpower – recruit, train, and develop people.

Q And how long did you stay at the Corey Agency?

A My gosh, until he retired.

Q Until who retired?

A Neil.

Q Oh, until Neil Corey retired.

A In 1989.

Q Okay. And when he retired, did you take over his agency?

A Uh-huh.

THE REPORTER: Yes?

[10] THE WITNESS: Yes. Sorry.

BY MR. LEONARD:

Q And that was in 1989?

A '89 or – February of '89 or '90.

Q Okay. And the Washington Corey Agency, where was that located?

A It was located, first of all, in the heart of Washington, Rhode Island Avenue in Northwest, and then he moved it up into Bethesda in 1980, '81.

Q Okay. And then from '81 to '89, it continued to be in Bethesda?

A Uh-huh – yes.

Q And is that the same location then you operated in –

A Yes.

Q – in Bethesda?

A Yes.

Q Okay. And you changed the name. When did you change the name of the agency?

A February of '89 or '90.

Q So you only operated as the Corey Agency for a short time after his retirement?

[11] A No. When he retired, it immediately became the Patten Agency. Immediate.

Q Okay. And you became general agent?

A (Witness moves head up and down.)

Q You have to give a verbal response.

A Yes.

Q And how did that come about? Were there any negotiations with Hancock about that, or was that sort of just something that was understood that you would take over Mr. Corey's agency?

A Never taken for granted. You would have to perform showing a track record of being able to recruit, train, and develop manpower.

Q Okay. Did you go through any kind of a process after Mr. Corey or even shortly before Mr. Corey retired to –

A I would say there was a six-month period. Interviewed, track history pulled out, accomplishments that I have done, anticipations that they expected me to do, and, again, they made their decision whether or not to promote me or not to promote me.

Q And obviously they made a decision to go ahead [12] and promote you to general agent?

A Uh-huh.

THE REPORTER: Yes?

THE WITNESS: Yes.

BY MR. LEONARD:

Q And the effective date was, you said, February of '89?

A It's February of either '89 or '90.

Q Are you still with the John Hancock Company?

A No.

Q When did that end?

A About two weeks ago.

Q Okay, And what was the nature of that separation?

A It was friendly. We had a compliance issue. I have been really interviewing for the past six months to take over what is called a "mega agency" with a top carrier.

Q What carrier is that?

A I can't disclose that.

Q Okay. And why can't you disclose it?

A Because, again, I've been told not to disclose [13] it because, again, it hasn't been set in stone yet. But I had a compliance problem.

Q Okay, explain what you mean by a "compliance problem."

A Whereby an individual – we really, as a public company, now follow what is called "office of business conduct." An individual, okay, who –

Q I don't mean to interrupt you, but when you say "we," you are referring to John Hancock?

A Yes, sir.

Q Okay.

A We had a problem where an individual was to lose his contract – an agent. A policy was issued, and, again, I authorized payment on the policy to be paid for, and, again, John Hancock said, "Hey, that is a no-no," which it is, and, again, said, "Ralph, you know, either you abide by it . . . " I had some disagreements over the past three or four months. This has been ongoing for six months, and –

Q When you say, "This has been ongoing," the compliance issue has been?

A This one issue. Okay?

[14] Q Okay.

A This one issue. And we severed relationships back two weeks ago.

Q Who officially canceled the contract? Was it you or was it John Hancock?

A I would say it was Hancock.

Q Did they generate any kind of paperwork or any kind of final document in conjunction with that separation?

A Yeah.

Q Did any of that paperwork set forth specifically the reasons why the contract was being canceled?

A Uh-huh.

THE REPORTER: Yes?

THE WITNESS: Yes.

BY MR. LEONARD:

Q Okay. And what was the reason?

A And that was for paying a premium.

Q And who was the sales agent involved in that particular one?

A Randall Seal, S-e-a-l.

[15] Q Okay. And when did this take place? When did the compliance issue take place?

A It was back – the case was in 1999, December of '99.

Q Okay. And explain exactly what transpired with regard to this compliance issue.

A Pardon me?

Q Explain exactly what happened with regard to this compliance issue.

MR. ZIMMERMAN: Just note my objection. I thought we were dealing with Mrs. Pappas's lawsuit against Mr. Patten and John Hancock. I'm not sure why –

MR. LEONARD: Well, I think it's relevant –

MR. ZIMMERMAN: Just let me finish. He's going to answer the question. I'm just not sure why it's relevant, the issue of why he is no longer with John Hancock.

MR. LEONARD: Okay.

BY MR. LEONARD:

Q If you could explain exactly your involvement in this compliance issue.

[16] A I already did one time.

Q Okay. I'm asking for a little bit more detail, if you could.

A A payment was made to save an agent's whole-time contract.

Q What payment was made? Are you talking about a premium?

A A premium.

Q Who made the premium?

A Me.

Q You advanced a premium?

A Uh-huh.

Q When the customer had not already committed to a particular product?

A Exactly.

Q Had you ever done that before?

A No. No.

Q You had never advanced a premium before –

A For Randall Seal?

Q No, for anybody.

A Okay, for my own client. Okay? For my own clients, yes.

[17] Q And how many times had you done that?

A Occasion.

Q But that also would be against the company policy, correct?

A Yes, sir.

Q Is it also – if you are aware, is it against any laws at all?

A A violation of NASD rules.

Q Were you ever investigated by the NASD for these compliance issues?

A No. No, never.

Q Okay.

A Never.

Q Okay. Other than the separation or the termination of your contract with Hancock, were there any other sanctions imposed by Hancock?

A No. Okay? It was just payment of premiums.

MR. LEONARD: Okay, let me get this marked as Patten Exhibit 1.

(A John Hancock Mutual Life Insurance Company contract, dated 1/1/96, was marked Deposition Exhibit [18] No. 1 for identification.)

BY MR. LEONARD:

Q Why don't you take a look at this, and if you could identify that.

MR. MURPHY: Declan, just for the record, I don't know if this is a complete copy of the contract.

MR. LEONARD: Okay.

MR. MURPHY: So I'm just going to note my objection. I'm not sure if it is. I realize that it says 1 through 6, but other agreements I've seen typically have attachments.

MR. LEONARD: Okay, we can certainly stipulate that there are no attachments; that it is just the contract without any attachments.

MR. MURPHY: Well, what I'm saying is I think the attachments may be part and parcel to the agreement, so I think it may be an incomplete exhibit.

MR. LEONARD: Okay.

THE WITNESS: They have faxed me a contract of my current general agent –

MR. ZIMMERMAN: That's not what he's asking you. Let him ask a question. He didn't have a [19] question. He just asked you to look at that.

BY MR. LEONARD:

Q Yeah, I just asked you to look at that. Do you recognize the document?

A Not really, okay, even though it is my signature.

Q Okay. Just looking at the first page up at the top there, if you could read that, just the little area up there. It is a contract between you and John Hancock; is it not?

A Okay. Uh-huh.

MR. ZIMMERMAN: Yes?

THE WITNESS: Yes.

BY MR. LEONARD:

Q Do you recall why this contract came about?

A (Witness moves head from side to side.)

Q Not at all?

A Not at all.

Q Okay, the date on the top of that appears to be January 1st, 1996. That doesn't ring a bell that you would have signed something at that time?

A No. As I said, February 1, 1989, or '90.

[20] Q Okay. That is when you began with the John Hancock Agency as a general agent, correct?

A Yes. Yes, sir.

Q But each year did you have to sign a new contract?

A Can't recall. I don't recall.

Q Do you remember if you signed any contract after February of 1989 or 1990 up to the present date with Hancock?

A Yeah, they've changed my contract several times.

Q Okay. But you don't remember whether this was an annual thing?

A No. No, I don't.

Q But is it fair to say that on Page 6 that your signature appears on that page?

A That is my signature.

Q Under the "General Agent"?

A Yeah.

Q Okay.

MR. LEONARD: (To the reporter) There you go. That's Patten Exhibit 2.

* * *

[157] A No.

Q Who prepared it?

A My secretaries.

Q Okay. So how many people would have known about that letter?

A My secretary.

Q Which one is that?

A Delores Reidy.

Q Okay. Delores Reidy and yourself, you both knew about the letter that was sent to David Edstrom. Who else within the Patten Agency knew about that letter?

A To be certain, just me and Delores.

MR. LEONARD: Okay, I've got nothing further.

(Brief recess.)

EXAMINATION BY COUNSEL FOR DEFENDANT JOHN HANCOCK LIFE INSURANCE COMPANY BY MR. MURPHY:

Q Good morning, Mr. Patten.

A Good morning.

Q I'm Mike Murphy. I'm with the law firm of Ogletree, Deakins, and I'm here on behalf of John Hancock, and I do have some follow-up questions to the [158] questions posed by Mr. Leonard.

Mr. Leonard had put in front of you as an exhibit – I think it was Patten Exhibit 1 – something he was terming "your general agent agreement," and at the outset when he presented the exhibit to you I noted for the record that it was my understanding that, in fact, this was only part of an agreement between you and Hancock, and what I would like to do is make this an exhibit, and ask you to look at it. Actually, I'm going to make two pieces here an exhibit, and the court reporter will mark these.

(Discussion held off the record.)

(A John Hancock Life Insurance Company contract, dated 1/1/96, was marked Defendant Hancock's Exhibit A for identification.)

(A document entitled "Allowance Agreement (Formula)" was marked Defendant Hancock's Exhibit B for identification.)

BY MR. MURPHY:

Q Just take a moment to familiarize yourself [159] with the documents, and I will have a couple of questions.

(Witness reviews documents.)

Q Mr. Patten, I've placed in front of you two documents that are now marked Exhibit A and B. Exhibit B at the top is titled "Allowance Agreement," I believe. Is that correct?

A Correct.

Q And in parentheses it has "Formula."

MR. LEONARD: Just so it's clear, "Allowance Amendment"?

MR. MURPHY: Is it Allowance Amendment?

THE WITNESS: "Amendment," yes.

BY MR. MURPHY:

Q I don't have a copy of it. I'm sharing my copies, but I can see okay.

Would you explain what it means to be a formula general agent?

A There is a formula in John Hancock and there is developmental. Developmental, John Hancock pays you your salary. Formula makes me totally responsible for the rise or the fall of the agency, for all expenses, [160] including commission payouts, ERAs, expense reimbursement allowances, salaries to managers, rent, supplies, group insurance, so forth and so on. Monies come in on the 1st of every month, the 15th of every month. If you don't have the money to cover expenses, you go to the bank.

Q In 1996, do you recall whether or not you were a formula agent?

A Always a formula.

Q You've always been a formula?

A Always been a formula.

Q Okay. Have you ever been in a situation where you have, in fact, had to go to the bank to cover expenses?

A Never. Never.

Q So your production as an agency has been good enough in terms of the revenues that you brought in to cover your costs and your expenses?

A Yes, sir.

Q What do you attribute your success to as a general agent?

A The ability to attract quality individuals, [161] the ability to expand marketplaces – be it life insurance, and more importantly long-term care. My expertise, I think, is in the investment field that financial services has branched out in, and I think the loyalty that I have developed over the last 30 years with John Hancock. I basically have – I work for my agents, and they know that. There is nothing short of anything that I won't do for them.

Q You are familiar with the term "independent contractor"?

A I am.

Q As a general agent, did you consider yourself an independent contractor?

A I was.

Q And why is that so?

MR. LEONARD: I'm going to object to the extent independent contractor is a legal term.

BY MR. MURPHY:

Q Well, what do you understand the term "independent contractor" to mean?

A I have been drilled for 10 years, "You are an independent contractor, period, Ralph. Your agents [162] work for you, not the John Hancock." Legally, guys, I don't know the ramification of that phrase, but I've been taught I'm an independent contractor.

Q As an independent contractor, do you understand, for example, as a formula general agent, that means that you are on the hook –

MR. LEONARD: I'm sorry, I'm going to object to the form of the question, although in the interest of time it probably is smart, but it is leading, and since this would be defendant's witness –

MR. MURPHY: Well, Mr. Leonard, this would be Mr. Zimmerman's witness.

MR. LEONARD: Well, to the extent he is an adverse witness, then I understand that; but to the extent he is not, then certainly it is leading. But in the interest of time, it's probably worth doing it.

MR. MURPHY: All right.

BY MR. MURPHY:

Q Let me try to do it this way. You explained that as a formula general agent, you understood that that meant

that basically you were on the hook for the liabilities and costs associated with running your [163] agency?

A Yes, I am.

Q And, likewise, in that capacity you were, in effect, an independent business person who got to make choices in terms of how you wanted the agency run?

A Absolutely.

Q And you had the choice to decide, for example, which clients you wanted to solicit and which clients you didn't want to solicit?

A True.

Q You had the choice with respect to which markets you wanted to penetrate versus which markets you didn't want to penetrate?

A Absolutely.

Q And you didn't have to check with Hancock on a daily basis with respect to those choices?

A None, whatsoever.

Q And so that is the sense I'm using the term "independent contractor," is that really you called the shots in your own right with respect to the Patten Agency?

A Correct.

[Exhibits B and C Deleted in Printing]

EXHIBIT D

DECLARATION OF GRANT DAVID WARD

I, Grant David Ward, am over 18 years of age and competent to make this Declaration.

1. I am currently employed as a counsel for John Hancock Financial Services, Inc. John Hancock Financial Services, Inc. is the holding company for John Hancock Life Insurance Company, formerly known as John Hancock Mutual Life Insurance Company.

2. From January until April 2001, Ralph Patten ("Patten"), through his then counsel Donald N. Sperling ("Sperling"), corresponded with me over the payment of various financial items, including post-terminal commissions under his General Agency contract.

3. During this period of time, neither Patten nor his then counsel Sperling made any claims of discrimination, wrongful termination, breach of contract, or breach of the implied covenant of good faith and fair dealing.

4. In fact, as of April 2001, I believed that all outstanding matters with Patten were resolved, including but not limited to the payment of post-terminal commissions which amounts to a payment to Patten of approximately $343,000.

I make this Declaration under the penalty of perjury under the laws of the United States and the Commonwealth of Massachusetts.

/s/ Grant David Ward
Grant David Ward, Esq.

Date: August 23, 2002

[Exhibit E Deleted in Printing]

EXHIBIT F

John Hancock Financial Services, Inc. [LOGO]
Law Sector
Employment, Agency & Labor Relations Law

John Hancock Place
Post Office Box 111
Boston, Massachusetts 02117
(617) 572-9166
Fax: (617) 572-9161
E-mail: phuvos@jhancock.com

Philip A. Huvos
Assistant Counsel

August 30, 2001

VIA FACSIMILE & U.S. MAIL

Michael L. Zimmerman, Esq.
Brault, Palmer, Grover, Zimmerman,
White & Steinhilber, LLP
10533 Main Street
P.O. Box 1010
Fairfax, VA 22030-1010

Re: Ralph Patten

Dear Mr. Zimmerman:

Your letter to Grant Ward, dated August 2, 2001, has been forwarded to my attention. In that letter, you assert your belief that John Hancock wrongfully terminated Mr. Patten. You further assert that Mr. Patten has been discriminated against partially because of his age. John Hancock unequivocally denies these baseless allegations.

Your review of Mr. Patten's contract ("the Contract") with Signator Insurance Agency, Inc. ("Signator") will

reveal that Mr. Patten was not an employee of John Hancock or Signator. Indeed, Section 2 of the Contract explicitly states: "Nothing contained herein shall be construed to create the relation of employer and employee between the Company and the General Agent." That section goes on to describe the General Agent's freedom to exercise judgment as to the persons from whom applications will be solicited for insurance and the time, place and manner of solicitation subject to Company or provider rules and regulations regarding its products, without interfering with the General Agent's freedom of action.

Your further review of the Contract will reveal that Section 42 and Section 44 set forth the manner in which the Contract may be terminated. Specifically, Section 42 states that fraud, misappropriation or withholding of funds by the General Agent automatically terminates the Contract. Thereafter, no payments of any kind, including payment of post-termination commissions are payable to the General Agent. Section 44 states that the Contract and the rights of the General Agent, with the exception of post-termination commissions, if any, "may be terminated for any reason at the option of either parties hereto immediately upon written notice." Your client was notified of the termination of his Contract with Signator, effective December 31, 2000, via a letter to him dated on December 14, 2000.

Subsequent to the December 14, 2000 letter, your client, through his attorney at the time, Donald Spelling, negotiated the payment of his post-termination commissions. In fact, Signator took several actions as accommodations. First, Signator agreed to move Mr. Patten's termination date to January 02, 2001 so that he would be eligible for a "cash balance" benefit. Originally, Mr.

Patten's termination date was December 31, 2000 and he would not have been eligible to receive his cash balance benefit. Furthermore, Signator elected to give Mr. Patten the option of selecting either the cash balance benefit or the post-termination commissions. After lengthy discussions between counsel for Signator, Mr. Patten and Mr. Sperling, Mr. Patten elected to receive post-termination commissions.

In sum, your client's termination was in accordance with the plain language of the Contract. As such, we consider this matter closed and we do not intend to revisit this matter now that Mr. Patten has chosen to retain another attorney to represent him.

Very truly yours,

/s/ Philip A. Huvos
Philip A. Huvos
Assistant Counsel

[Exhibit G Deleted in Printing]

EXHIBIT H

John Hancock Financial Services, Inc. [LOGO]
Law Sector

John Hancock Place
Post Office Box 111
Boston, Massachusetts 02117
(617) 572-9166
Fax: (617) 572-1565
E-mail: phuvos@jhancock.com

Philip A. Huvos
Assistant Counsel

March 13, 2002

VIA FAX and CERTIFIED MAIL

John M. Shoreman, Esq.
McFadden & Shoreman, P.C.
1730 K. Street N.W.
Suite 1000
Washington D.C. 20006

RE: Ralph Patten, Jr.

Dear Mr. Shoreman:

We are in receipt of your Demand for Arbitration regarding your client sent to us on March 4, 2002. We direct you to the Mutual Agreement to Arbitrate Claims which provides in relevant part as follows:

> The Company and I agree that the aggrieved party must give written notice of any claim to the other party within one (1) year of the date the aggrieved party first has knowledge of the event giving rise to the claim; otherwise the claim shall be void and deemed waived even if there is a federal or state statute of limitations which would have given more time to pursue the claim.

> Written notice to the Company, or its officers, directors, employees or agents, shall be sent to its Senior Vice President, General Agency Department, P.O. Box 111, Boston, MA 02117.

Your client was notified of the termination of his contract with Signator, effective December 31, 2000, via a letter dated to him on December 14, 2000. Subsequent to the December 14, 2000 letter, your client, through his attorney at the time, Donald Sperling, negotiated with Signator so as to move Mr. Patten's termination date to January 02, 2001. Certainly, Mr. Patten, through his then-counsel, had ample opportunity between January 02, 2001 and January 02, 2002 to raise the claims he now belatedly alleges.

In sum, for the foregoing reasons, Signator does not consider for Mr. Patten's Demand for Arbitration to be timely or proper.

Very truly yours,

/s/ Philip A. Huvos
Philip A. Huvos
Assistant Counsel

EXHIBIT I

McFadden & Shoreman, P.C.
ATTORNEYS AT LAW

1730 K. STREET N.W.
SUITE 1000
WASHINGTON D.C. 20006
TELEPHONE (202) 638-2100
TELECOPIER (202) 638-6783

[Names Omitted in Printing]

March 14, 2002

VIA FAX TRANSMISSION & REGULAR MAIL
Philip A. Huvos, Esq.
John Hancock Financial Services, Inc.
John Hancock Place
P.O. Box 111
Boston, MA. 02117

Re: Ralph Patten, Jr.

Dear Mr. Huvos:

Thank you for your letter of March 13, 2002. Mr. Patten's Demand for Arbitration is based on the Mandatory Arbitration provision of the Management Agreement between Mr. Patten and Signator Investors, Inc. This covers "all claims arising out of or in connection with the business of Signator." If your client believes that a "Mutual Agreement to Arbitrate Claims" supercedes, please forward a copy to my attention by return fax. I am instructed to initiate enforcement proceedings without further delay.

Yours sincerely,

/s/ John M. Shoreman
John M. Shoreman

cc: Ralph Patten, Jr.

[Exhibit J Deleted in Printing]

EXHIBIT K

John Hancock Financial Services, Inc. [LOGO]
Law Sector
Litigation/Employment Law Division

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Philip A. Huvos
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April 8, 2002

VIA FACSIMILE
202-638-6783

John M. Shoreman, Esq.
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Washington D.C. 20006

Re: Ralph Patten, Jr.

Dear Mr. Shoreman:

This letter is pursuant to our telephone conversation last Friday, wherein we discussed your client's attempt to seek arbitration relative to his termination in January 2001.

During that conversation, you indicated that your client did not have in his possession a fully executed copy

the Management Agreement between Signator Investors, Inc. and your client. Similarly, we do not have a fully executed copy of the same. Accordingly, it is difficult to perceive of a situation enabling your client to pursue arbitration under that agreement. Moreover, as you correctly noted in our conversation, even if there existed a fully executed copy of such an agreement, it is doubtful that its mandatory arbitration provision would be enforceable, as that provision, along with the rest of the agreement, was automatically terminated upon the termination of your client's NASD registration.

It therefore would appear that the only arbitration agreement by which you could potentially seek to compel arbitration would be the Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement") executed by your client and John Hancock in 1992. It is important to note, at this point, that in executing the Arbitration Agreement, your client acknowledged, among other things, that he had carefully read the Agreement, that he understood its terms, that he entered the Agreement voluntarily and not in reliance on any promise or representations by the Company other than those contained in the Agreement itself and that he had been given the opportunity to discuss the Agreement with his private counsel. It is equally worth noting that, since January 2001, your client has been represented by no fewer than three attorneys in this matter. Accordingly, any suggestion that your client, through his various attorneys, lacked the ability to follow the straightforward and unambiguous terms of the Arbitration Agreement simply defies common sense.

The Arbitration Agreement provides in relevant part as follows:

> The Company and I agree that the aggrieved party must give written notice of any claim to the other party within one (1) year of the date the aggrieved party first has knowledge of the event giving rise to the claim; otherwise the claim shall be void and deemed waived even if there is a federal or state statute of limitations which would have given more time to pursue the claim.
>
> Written notice to the Company, or its officers, directors, employees or agents, shall be sent to, its Senior Vice President, General Agency Department, P.O. Box 111, Boston, MA 02117.

Your client, through either one of the three attorneys he has hired to represent him in this matter, consistently failed to provide timely written notice in accordance with the foregoing provision. In our conversation on Friday, you indicated that a letter sent to Grant Ward, dated August 2, 2001 by one of your client's previous attorneys, Michael Zimmerman, constituted proper written notice. Your reliance on Mr. Zimmerman's letter is misplaced. The Required Notice Provision unambiguously provides that notice to the Company is to be sent to its Senior Vice President in its General Agency Department. Moreover, the Required Notice Provision requires that the notice be sent to the other party by certified or registered mail, return receipt requested. Mr. Zimmerman's letter simply did no such thing.

Mr. Zimmerman's letter also failed to constitute proper notice in that it stated that Mr. Zimmerman's "firm is in the process of preparing a lawsuit to be filed on behalf of Mr. Patten." Accordingly, rather than providing a written notice to the Senior Vice President of the General Agency Department for the purpose of a demand for

arbitration pursuant to the Arbitration Agreement, Mr. Zimmerman was threatening litigation in court in correspondence addressed to in-house counsel for the Company.

In sum, notwithstanding the fact that your client was represented by counsel, your client failed to submit timely and proper written notice pursuant to the Arbitration Agreement. While we understand that you may seek a motion to compel arbitration, please note that we intend to vigorously dispute such a motion.

Very truly yours,

/s/ Philip A. Huvos
Philip A. Huvos
Associate Counsel

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

RALPH F. PATTEN, JR., Plaintiff,	)	
v.	)	Civil Action No. L-02-1745
SIGNATOR INS. AGENCY, INC, *et al.*, Defendants.	)	

PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

COMES NOW, Plaintiff, Ralph Patten, Jr., by counsel and pursuant to 9 U.S.C. §10 (2004), and moves the court to vacate an arbitration award entered in favor of Defendants, John Hancock Life Insurance Company, Signator Investors, Inc., and Signator Insurance Agency, Inc., on January 10, 2004. In support whereof, the following is respectfully shown.

1. As more fully illustrated in the attached Memorandum in Support, the Arbitrator's dismissal of Plaintiff's claims under a Management Agreement was undertaken in manifest disregard of applicable law, and is contrary to the unambiguous language of the Management Agreement.

WHEREFORE, Plaintiff prays the court to enter an Order vacating the Arbitrator's dismissal of Plaintiff's arbitration claims under the Management Agreement.

Dated: April 9, 2004

Respectfully submitted,

/s/

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Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

RALPH F. PATTEN, JR., Plaintiff,	)	
v.	)	
SIGNATOR INS. AGENCY, INC, *et al.*, Defendants.	)	Civil Action No. L-02-1745

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD

Plaintiff, Ralph Patten, by counsel and pursuant to section 10 of the Federal Arbitration Act (the "Act"), 9 U.S.C. §10, moves to vacate an arbitration award entered in favor of Defendants, John Hancock Life Insurance Company (hereinafter, "John Hancock"), Signator Investors, Inc., and

Signator Insurance Agency, Inc., in support whereof the following is respectfully shown.

BACKGROUND

This case arises from Patten's claims that his termination by Defendants on January 2, 2001, was unlawful under state and federal law. John Hancock is a financial services company which sells insurance, annuities and other investment products. Signator Investors, Inc. and Signator Insurance Agency, Inc. are affiliates of John Hancock. Ralph Patten was associated with John Hancock and its affiliated companies for almost 30 years. Through the years Patten gained responsibilities as a General Agent and Principal of John Hancock. He managed John Hancock's Washington D.C. agency offices, from a branch office in Bethesda, Maryland, and had supervisory authority over all company representatives in the area. Patten was appointed as a General Agent of John Hancock in 1989. In 1998, Signator Investors, Inc. ("Signator") appointed Patten to be a Management Representative under the terms of a Management Agreement (Exhibit A). As a Management Representative, and pursuant to the terms of the Management Agreement, Patten managed and supervised Signator's sales staff of NASD registered representatives from 1990 until his termination. Patten performed his contractual obligations under the Management Agreement and was compensated by Signator under the Management Agreement until the time of his termination (Exhibit A, ¶2). The Management Agreement contains a broad mandatory arbitration clause:

> Signator and Branch Manager mutually consent to the resolution by arbitration of all claims or controversies ("claims"), whether or not arising

> out of the Branch Manager's status as a principal or representative of Signator (or Branch Manager's termination), that Signator may have against Branch Manager or that Branch Manager may have against Signator or against its officers, directors, employees or representatives in their capacity as such or otherwise. The claims covered by this consent to arbitration include all claims arising out of or in connection with the business of Signator, including but not limited to the following: claims for commissions or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to, race, sex, religion, national origin, age, marital status or medical condition, handicap or disability); claims for benefits (except where a benefit or pension plan specifies that its claims procedure shall culminate in any arbitration procedure different from this one), can claims for violations of any Federal, state or other governmental law, statute, regulation, or ordinance.

(Exhibit B, ¶11). The Management Agreement does not state a time limitation within which a claim for arbitration must be served. Six years prior to the Management Agreement, and separate and apart from the terms of that agreement[1], Patten signed a Mutual Agreement to Arbitrate Claims (the "Mutual Agreement") with John Hancock. (Exhibit B). Notice of a claim under the Mutual

---

[1] The Management Agreement states:

12. **MISCELLANEOUS.** This Agreement supersedes all previous agreements, oral or written, between the parties hereto regarding the subject matter hereof, and may be amended by written notice to Branch manager by Signator at any time.

Agreement is required to be written and given within one (1) year of the "date the aggrieved party first has knowledge of the event giving rise to the claim." (Exhibit B).

Patten took issue with his termination of January 2, 2001, as being unjust, discriminatory and undertaken in bad faith. By letter of August 2, 2001, Patten's attorney, Michael L. Zimmerman, notified Defendants of the claims that Patten was "wrongfully terminated" and "discriminated against" through the selective enforcement of internal policies, partially due to his age. On March 4, 2002, an explicit Demand for Arbitration was issued to Defendants on Patten's behalf. Again, Defendants were notified of Patten's claims for unlawful discrimination, wrongful termination and breach of contract. Nevertheless, Defendants refused to arbitrate the claims, and Patten was forced to file a complaint to compel arbitration with this court. By Order of November 5, 2002, this court granted Patten summary judgment and directed Defendants to submit to arbitration.

On January 10, 2004, the Arbitrator, without a hearing, issued an award in Defendants' favor and dismissed Patten's claims "on the sole ground that . . . [his] . . . March 4, 2002 Demand for Arbitration is time-barred." (Exhibit C, at 7). The Arbitrator recognized this case to arise "pursuant to two separate agreements," the Mutual Agreement and the Management Agreement. (Exhibit C, at 1). He ruled that Mr. Zimmerman's letter of August 2, 2001, did not constitute proper notice under the Mutual Agreement because it did not satisfy the "explicit requirements" of specificity in describing the claims raised. (Exhibit C, at 6). Accordingly, Patten's claims under the Mutual Agreement with John Hancock were dismissed as time-barred. While a persuasive argument might be made

that the dismissal of claims under the Mutual Agreement was a clear error of law, Patten recognizes that an arbitration award will not be vacated under the Act on grounds of an arbitrator's mere error in the interpretation of a contract's terms. However, the Arbitrator's subsequent ruling that claims under the Management Agreement were time-barred also is so patently wrong that it constitutes manifest disregard of the law and warrants action by this court to vacate the award.

The Arbitrator modified the explicit and unambiguous terms of the Management Agreement so as to bar Patten's claims. According the his [sic] ruling, the one-year limitation period contained in the Mutual Agreement is "implied" in the Management Agreement, which on its face contains no time-limitation. (Exhibit C, at 6-7). Defendants drafted both the Mutual Agreement and Management Agreement without Patten's input or participation; Patten was required to sign both agreements as a condition of his employment and retention. The terms of the Management Agreement actually supersede the terms of the Mutual Agreement. If Defendants intended to impose a one-year limitation in the Management Agreement, as they did in the Mutual Agreement, they had every opportunity to do so during the drafting process or by later amendment. (*See*, footnote 1, *supra*.). Prior to the award, Defendants never even espoused the argument that Patten's claims were barred by an implied time limitation in the Management Agreement. The Arbitrator reformed the Management Agreement to contain a time limitation that was never intended by either party to the contract. He also imported the "explicit" claim specification requirements of the

Mutual Agreement into the Management Agreement, even though the latter is silent on the subject.[2] Such a ruling is entirely unsupported by the record or circumstances of this case and could only be made in manifest disregard of established principles of law and contract interpretation under the Act and Massachusetts law.[3]

ARGUMENT

In addition to the statutory grounds for vacating an arbitral award set forth in Section 10 of the Act, a federal court may properly vacate an award that is contrary to the plain language of an arbitration agreement, or that is made in "manifest disregard" of the applicable law. *See, e.g., Advest, Inc. v. McCarthy,* 914 F.2d 6, 9-10 (1st Cir. 1990). The arbitrator's interpretation of a time-bar provision in an arbitration agreement must "draw its essence" from the agreement itself. *Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc. WOR Div.*, 546 F.2d 1107, 1113 (2nd Cir. 1977). While a federal court is generally required to refrain from reviewing the merits of an arbitrator's award, it is empowered to set aside an award if the arbitrator disregards or modifies the plain and unambiguous provisions of an arbitration agreement, or if the record reveals no support whatever for his determinations. *Storer Broadcasting Co. v. American Federation of TV and Radio*

---

[2] Thus, even assuming *arguendo* that implying a one-year notice period in the Management Agreement is permissible, dismissing the August 2, 2001, letter as unsatisfactory notice of a claim thereunder (by further implying the Mutual Agreement's strict requirements of claim specification in the Management Agreement), is so patently wrong it also constitutes manifest disregard of the law.

[3] The Management Agreement requires application of the laws of Massachusetts. (Exhibit A, ¶ 13).

Artists, 600 F.2d 45, 47 (6th Cir. 1979). In short, an arbitration award may be vacated under the Act where it is completely irrational or evidences disregard for the law.

The arbitration provision of the Management Agreement is plain and unambiguous. (Exhibit A, ¶11). No notice period for filing an arbitration claim is specified. The Management Agreement was drafted by Defendants, as was the Mutual Agreement that the parties entered into six years earlier. Whereas the Mutual Agreement contains a clearly defined one-year notice period, the Management Agreement is silent. Given that a notice period was specified in the earlier agreement, the intention of the parties not to specify a notice period in the Management Agreement is clear and obvious. The Arbitrator states that the Management Agreement "necessarily contains an implied term limit to be considered for the filing of claims. Otherwise . . . a claim could be filed two, five, ten or twenty years after the occasion of the triggering event." (Exhibit C, at 6). This analysis is completely irrational. The absence of a specified notice period for the filing of an arbitration claim obviously signifies the intent of the parties to be governed by applicable statutes of limitations. Contrary to the Arbitrator's suggestion, an uncertain and open-ended period for the filing of a claim is not created in this circumstance. Under Massachusetts' law, Patten's claims for wrongful termination fall under a three-year statute of limitation (General Laws ch.260, §2A (2004)); his breach of contract claims fall under a six-year statute of limitation (General Laws ch.260, §2 (2004)).[4]

---

[4] Under Maryland law, Patten's common law claims fall under a three-year statute of limitations (Md. Code Ann. §5-101 (2003).

Using extrinsic evidence to imply a notice period where none exists within the unambiguous terms of the Management Agreement violates long-established principles of contract interpretation. *See, Edwin R. Sage Co. v. Foley,* 12 Mass. App. Ct. 20, 28, 421 N.E.2d 460 (1981) (if the provisions of a contract are free from ambiguity, they must be construed in accordance with their ordinary meaning). A contract is ambiguous "only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is a proper one." *Bercume v. Bercume,* 428 Mass. 635, 641, 704 N.E.2d 177 (1999). An unambiguous contract must be enforced according to its terms; if the contract is clear and complete, evidence of the parties "alleged subjective intent" is not considered. *See, Schwanbeck v. Federal-Mogul Corp.,* 412 Mass. 703, 706, 592 N.E.2d 1289 (1992). Extrinsic evidence is not admissible to supplement, contradict or vary the agreement where the terms of the contract are unambiguous. *Mass. Mun. Wholesale Elec. Co. v. Danvers,* 411 Mass. 39, 48, 577 N.E.2d 283 (1991). These principles of general application have been long recognized by the Supreme Court. *See, e.g., New Orleans v. New Orleans Water Works, Co.,* 142 U.S. 79 (1891) (a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the interpretation or construction of a contract does not include its modification or the creation of a new or different one.); *see, also, Baltimore v. Baltimore Railroad,* 77 U.S. 543 (1870) (contract must be construed and enforced according to the terms employed, and a court has no right to interpret the agreement as meaning something different form [sic] what the parties intended as expressed by the language they saw fit to employ).

Even if we assume for the purposes of argument that an uncertainty existed in the Management Agreement due to the absence of a specified notice period for the filing of a claim, the Arbitrator's failure to resolve that uncertainty in favor of Patten was in manifest disregard of long-established legal principles. Under Massachusetts law, any ambiguity is resolved against the party who drafted the contract. *See, MacArthur v. Mass. Hosp. Service, Inc.*, 343 Mass. 670, 672, 120 N.E.2d 449 (1962) (where contract permits two rational interpretations, courts should choose the one that is more favorable to the party which did not draft the contract). Patten had no input or participation in drafting the Management Agreement, which is essentially a contract of adhesion. In creating an ambiguity where none actually existed, and then resolving that ambiguity in favor of the party who drafted the agreement, the Arbitrator disregarded long-etablished [sic] and clearly articulated principles of law and contract interpretation. The Arbitrator's disregard of the controlling law is so blatantly obvious that a travesty of justice will occur unless the court vacates the dismissal of Patten's claims under the Management Agreement.

CONCLUSION

For the reasons set forth above, Plaintiff requests the court to vacate the Arbitrator's dismissal of claims under the Management Agreement.

Dated: April 9, 2004

Respectfully submitted,

/s/

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Attorneys for Plaintiff

APPENDIX Q

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND NORTHERN DIVISION

RALPH E. PATTEN, JR., Plaintiff, v. SIGNATOR INSURANCE AGENCY, INC., et al., Defendants.	)	CIVIL ACTION NO. L-02-1745

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

Defendants Signator Insurance Agency, Inc., Signator Investors, Inc., and John Hancock Life Insurance Company hereby file this Opposition to Plaintiff Ralph Patten's Motion to Vacate Arbitrator John C. Truesdale's January 10, 2004 Award. As shown below, Plaintiff Ralph Patten ("Patten") fails to meet his burden as established by the Fourth Circuit for setting aside an arbitration award and, as a result, the Court should deny Patten's Motion to Vacate as a matter of law.

ARGUMENT

The Fourth Circuit has consistently rejected attempts by a losing party to an arbitration such as Patten to obtain a "second bite at the apple" by bringing a motion to vacate. Notwithstanding the absence of Fourth Circuit citations in Patten's papers, the Fourth Circuit has been crystal clear in articulating the applicable standard of review in a case

such as this. For example, in *Remmey v. Painwebber Inc. and Marks*, 32 F.3d 143 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995) the Court of Appeals, in rejecting a motion to vacate an arbitration award, held:

> We must underscore at the outset the limited scope of review that courts are permitted to exercise over arbitral decisions. Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it. [citations omitted]. . . . Opening up arbitral awards to myriad challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to use a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to losing party." [citation omitted]. Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "'whether the arbitrators did the job they were told to do – not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" [citation omitted]. Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts. . . . The statutory grounds for vacatur permit challenges on sufficiently improper conduct in the course of the proceedings; they do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached. Accordingly, parties may

> not seek a "second bite at the apple" simply because they desire a different outcome.

Remmey, 32 F.3d at 146.

In the instant case, Patten seeks a "second bite at the apple." He attacks the Arbitrator's Award as "irrational" and "so patently wrong that it constitutes manifest disregard of the law." Patten's Memorandum, pp. 4-6. However, the Fourth Circuit has ruled that in making a claim that an arbitrator has acted in "manifest disregard of the law," a party "shoulders a heavy burden." *Remmey*, 32 F.3d at 149. Specifically, in this regard, the Court has held: "a court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." *Remmey*, 32 F.3d at 149. Indeed, as this Court has previously observed in rejecting a "manifest disregard" challenge:

> "Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . Judicial inquiry under the 'manifest disregard' standard is . . . extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable."

Jih v. Long & Foster Real Estate, Inc., 800 F. Supp. 312, 320 (D. Md. 1992), *quoting Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). Furthermore, in *Jih*, this Court noted:

> Judge Phillips, writing for the Fourth Circuit, similarly has stated:
>
> > A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable 'even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion,' and may only be reversed 'when arbitrators understand and correctly state the law but proceed to disregard the same.'
>
> *Jih v. Long & Foster Real Estate, Inc.*, 800 F. Supp. 312, 320 (D. Md. 1992), *quoting Upshur Coals Corp. v. UMWA, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991).

Patten has not and cannot meet this heavy burden here. In particular, even assuming *arguendo* that Patten's recitation of the law is correct, which the Defendants do not concede to be the case, Patten nonetheless has not and cannot show, as required by *Remmey*, that the Arbitrator was "aware of the law, understood it correctly, found it applicable to the case before [him], and yet chose to ignore it in propounding [his] decision."

Furthermore, to the extent that Patten argues that the Arbitrator misinterpreted the Management Agreement, which he did not do, the Fourth Circuit has also clearly held that "'as a matter of law' neither misinterpretation of a contract nor an error of law 'constitutes a ground on which an award can he vacated.'" *Apex Plumbing*

Supply, Inc, and Falchick v. U.S. Supply Co., Inc., 142 F.3d 188, 193-94 (4th Cir. 1998), *quoting Farkas v. Receivable Financing Corp.*, 806 F. Supp. 84, 87 (E.D. Va. 1992).

CONCLUSION

In light of the Fourth Circuit precedent cited above, Arbitrator Truesdale clearly did his "job." He interpreted the Mutual Agreement to Arbitrate Claims and the Management Agreement and concluded that Patten's claims were barred. While Patten disagrees with the Arbitrator's interpretation of the Management Agreement and seeks to substitute his own interpretation for that of the Arbitrator's, this is clearly not a lawful basis on which to set aside an arbitration award. Therefore, for all the foregoing reasons, Patten's Motion to Vacate should be denied.

Respectfully submitted,

/s/ Michael J. Murphy

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Dated: April 22, 2004

[Certificate of Service Deleted in Printing]

(2)

No. 06-49

FILED
SEP 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN HANCOCK LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

v.

RALPH F. PATTEN, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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September 2006

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INTRODUCTION

In this case, petitioners seek review of an issue they never contested below and on which the federal courts of appeals are in unanimous agreement: Whether a court may vacate an arbitration award for "manifest disregard of the law." Every court of appeals agrees that it may—and this Court has said so, too. Petitioners try to conjure up a conflict by identifying minor differences in the wording the courts use to define manifest disregard, but the differences are semantic. The consensus view of the courts of appeals is that an arbitrator manifestly disregards the law when he deliberately refuses to follow what he knows to be the law. The decision below is merely a fact-bound application of that consensus view.

Only in the Seventh Circuit is there uncertainty about the manifest disregard standard. Although petitioners suggest that the Seventh Circuit has rejected manifest disregard as a basis for overturning an arbitration award, all the decisions of that court acknowledge that manifest disregard for the law is a ground for vacating an arbitration award. There are, however, two lines of authority in the Seventh Circuit, one of which agrees with the consensus definition of manifest disregard, while another seems to define it more narrowly to include only the unusual circumstance where an arbitrator orders the parties to violate the law. The panel that devised the latter definition, however, limited it to cases where an arbitration agreement did not specify a rule of decision, and hence it would not apply to this case, where the parties' agreement states that it is governed by Massachusetts law.

In any event, the Seventh Circuit's apparent internal uncertainty about the manifest disregard standard, until definitively resolved by that court, does not establish a conflict among the circuits, and this Court does not sit to resolve intra-circuit disagreements that a court of appeals is fully capable of handling through the en banc rehearing process. If and when the Seventh Circuit conclusively adopts a manifest disregard standard that is out of step with the consensus of the

circuits—and applies it in a case where it makes a difference to the outcome—this Court can address the conflict that will then have arisen. Until then, there is no need for review.

Petitioners also seek resolution of a purported conflict over the Fourth Circuit's alternative rationale: that the arbitrator's decision did not draw its essence from the contract between the parties. Petitioners assert that this aspect of the Fourth Circuit's decision conflicts with Second Circuit decisions holding that the "essence of the agreement" doctrine is limited to labor arbitration and is inapplicable to commercial arbitration under the Federal Arbitration Act (FAA). Petitioners did not raise this issue in a timely manner below, and in any event, there is no conflict. The Second Circuit has made clear that a concept indistinguishable from the "essence of the agreement" standard applies under the FAA, where, as a corollary to the manifest disregard of law standard, an arbitrator's award may be vacated where it is in manifest disregard of the terms of the agreement. That standard is not meaningfully distinct from the "essence of the agreement" standard applied by the Fourth Circuit here, and thus there is no circuit conflict that requires review.

Finally, petitioners ask this Court to decide, contrary to the holdings of all the circuits, that neither manifest disregard of the law nor *any* ground of vacatur not explicitly set forth in the FAA may be used to challenge an arbitration award. Again, petitioners did not preserve this argument below, and it is therefore not properly presented by the petition for certiorari. In any event, petitioners' radical attempt to overturn long-settled law in every circuit does not merit plenary review by this Court. A well established consensus of the lower courts, supported by statements of this Court, should not be upset merely because a litigant is dissatisfied with the application of the law to the facts of its case, and there are no other reasons necessitating review of the issue by this Court.

STATEMENT OF THE CASE

1. Arbitration Agreements. Ralph Patten worked for petitioner John Hancock Life Insurance Company and its affiliates for nearly thirty years, until he was fired in 2001. Pet. App. 2a-3a. This case arises out of Patten's attempt to arbitrate his claim that he was wrongfully terminated and discriminated against based on age.

Patten and his employers had entered into two mandatory arbitration agreements. The 1992 "Mutual Agreement" provided that any claims not asserted within one year would be waived. Pet. App. 2a. In 1998, Patten entered into a new "Management Agreement" with petitioner Signator Investors, one of the John Hancock affiliates. Pet. App. 3a. Like the Mutual Agreement, the Management Agreement contained a mandatory arbitration clause. Unlike the Mutual Agreement, the Management Agreement did not limit the time for asserting claims. The Management Agreement expressly provided that it superseded all prior agreements and was governed by Massachusetts law.

2. District Court and Arbitration Proceedings. In August 2001, eight months after he was notified of his termination, Patten informed petitioners in writing that he was preparing to file suit alleging wrongful termination and age discrimination. Pet. App. 3a. In March 2002, after settlement attempts proved unsuccessful, Patten submitted a demand for arbitration asserting contract claims and state and federal employment discrimination claims. Pet. App. 4a. Petitioners refused to arbitrate because they maintained that the demand for arbitration was untimely under the superseded Mutual Agreement's one-year limitations period. Pet. App. 4a. Patten successfully filed suit in federal court to compel arbitration.

After extensive discovery, petitioners filed a summary judgment motion in the arbitration, arguing that Patten had failed to comply with the Mutual Agreement's one-year limitations period. Patten argued that he had complied with both agreements—that is, he had substantially complied with the

Mutual Agreement's one-year notice requirement, and the Management Agreement contained no such requirement.

The arbitrator ruled that the arbitration was governed by both agreements. He acknowledged that the Management Agreement contained no time limit, but nevertheless declared that it "necessarily contain[ed] an implied time limit." He adopted the superseded Mutual Agreement's one-year limit as the "implied" limit for the Management Agreement, and ruled that Patten's claims were time-barred. Pet. App. 5a-6a.

Patten moved in the district court to vacate the arbitration award on the grounds that it was in manifest disregard of the law and did not draw its essence from the parties' agreement. The district court denied the motion and Patten appealed.

3. Decision Below. On appeal, Patten sought only to vacate the arbitrator's dismissal of his claims under the Management Agreement against Signator Investors, arguing that the ruling that the Agreement contained a time limit—in the face of the arbitrator's acknowledgement that it did not and its express supersession of all prior agreements—constituted a manifest disregard of the law and failed to draw its essence from the agreement. The Fourth Circuit agreed.

The court explained that a party claiming manifest disregard of the law has the "heavy burden" of showing that the "arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same." Pet. App. 9a (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994); *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991)). Applying that standard, the court concluded that the arbitrator had "revised the governing arbitration agreement on the basis of his own 'personal notions of right and wrong' and imposed a limitations period on the parties that they had specifically rejected." Pet. App. 12a-13a (citations omitted). The error went beyond a mere misapplication of contract law or an erroneous contract interpretation, which courts may not correct. Pet. App. 13a.

Instead, the arbitrator had effectively amended or altered the agreement and acted beyond the scope of his authority. *Id.*

Judge Luttig, in dissent, agreed with the majority that the arbitrator's decision was "clearly erroneous," and that the appropriate standard was supplied by *Remmey*, Pet App. 14a, but he would have applied the standard differently to the facts and, "with some reluctance," would have affirmed the district court's refusal to vacate the award. Pet. App. 16a.

Petitioners' request for en banc rehearing was denied because "no member of th[e] Court or the panel requested a poll on the petition." Pet. App. 44a. *See* 4th Cir. R. 35(b).

REASONS FOR DENYING THE WRIT

I. Petitioners Did Not Properly Raise Any of Their Questions Presented in the Fourth Circuit.

In this Court, petitioners assert that the Fourth Circuit's manifest disregard of law standard is legally erroneous and contrary to the law of other circuits; that the Fourth Circuit improperly applied the "essence of the agreement" doctrine to a non-labor arbitration and in a manner contrary to decisions of other circuits; and, finally, that *all* "non-statutory" grounds for vacatur of arbitration awards (including manifest disregard and the "essence of the agreement" doctrine) are contrary to the FAA. Petitioners did not properly raise any of these issues in the Fourth Circuit. Accordingly, they are not properly before this Court. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

In their brief below, petitioners expressly argued that the Fourth Circuit's definition of the manifest disregard standard in *Remmey*, 32 F.3d at 149—the very standard applied by the panel—correctly stated the law applicable to this case. *See* Br. for Appellees 4-6. Even in their petition for rehearing en banc, when they were no longer arguably constrained from arguing that Fourth Circuit law was incorrect and should be overruled, petitioners argued only that the panel had misap-

plied the *Remmey* standard to the facts, not that the standard itself was incorrect. *See* Pet. for Reh'g 13-15. The Fourth Circuit never had the opportunity to address the arguments petitioners now advance—namely, that its manifest disregard standard is legally erroneous and should be abandoned or replaced by what petitioners claim are the more stringent standards applied in other circuits.

Similarly, although respondent argued in his opening brief below that the arbitrator's award did not draw its essence from the parties' contract (*see* Br. for Appellant 10), petitioners' brief did not argue that the "essence of the agreement" standard is restricted to labor arbitration. *See* Br. for Appellees 3-7. Nor did petitioners argue, as they do now, that the circuits vary in how stringently they apply the "essence of the agreement" test, and petitioners nowhere urged the court to select some variant of the standard they deemed more favorable. *See id.* Rather, their brief ignored the "essence of the agreement" issue altogether. Only in their rehearing petition did they first argue that the standard is inapplicable to this case. There is no reason, however, that that argument could not have been pressed in their briefs before the panel.

Finally, petitioners' papers below never so much as hinted at the broadest argument they now advance—that the FAA completely forecloses all "non-statutory" grounds for vacatur, including manifest disregard. In both their brief and their petition for rehearing en banc, petitioners expressly urged the Fourth Circuit to apply its existing manifest disregard standard, a position flatly inconsistent with their current view that the standard violates the FAA. Petitioners might legitimately claim it would have been futile to advance this argument in their brief, since the panel could not have ignored the circuit's adoption of the manifest disregard standard in *Remmey* and other cases, but there is no excuse for not raising the claim in their petition for rehearing en banc. The very purpose of the en banc procedure is to allow the court to overrule prior opinions and address issues that have

divided the circuits (as petitioners claim, incorrectly, that this issue has done). By not raising the issue, petitioners denied the Fourth Circuit the opportunity to consider whether the manifest disregard standard should be discarded, and this Court should not consider that question in the first instance.

II. There Is No Conflict Among the Circuits Over Manifest Disregard.

A. The Manifest Disregard Doctrine Applied Below Has Been Settled Law for Decades.

For half a century, federal courts have reviewed arbitration awards for manifest disregard of law. The doctrine had its genesis in this Court's decision in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), where the Court stated that "interpretations of the law by ... arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation" (emphasis added). Although *Wilko*'s holding that federal securities claims are nonarbitrable was overruled in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), this Court has reiterated that arbitration awards are subject to review for manifest disregard of the law on a number of occasions. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 259 (1987); *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 601 (1985). Most recently, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court cited *Wilko* for the proposition that manifest disregard of the law is among the "very unusual circumstances" in which the courts will set an arbitrator's decision aside. *Id.* at 942.

Soon after *Wilko*, lower federal courts began to review arbitration awards for manifest disregard of law. The first district courts to apply the doctrine were *Dulien Steel Products Inc. of Washington v. The Ogeka*, 147 F. Supp. 167 (W.D. Wash. 1956), and *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957). The courts of appeals quickly followed suit, with the Second and

Ninth Circuits addressing the issue in *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960), and *San Martine Compania De Navegacion, S. A. v. Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961). As the Second Circuit explained in *Amicizia*, the FAA provides that "an award may be vacated where the arbitrators have 'exceeded their powers,'" and "[a]pparently relying upon this phrase, the Supreme Court in *Wilko v. Swan*, ... suggested that an award may be vacated if in 'manifest disregard' of the law." 274 F.2d at 808. The Ninth Circuit similarly invoked *Wilko* and, cautioning that review for manifest disregard must be very limited, stated that "[w]e apprehend that a manifest disregard of the law ... might be present when arbitrators understand and correctly state the law, but proceed to disregard the same." 293 F.2d at 801.

In the 46 years since the Second Circuit's decision in *Amicizia*, the federal courts of appeals—the First through Eleventh, D.C. and Federal Circuits—have *unanimously* held that manifest disregard of the law is a basis for vacating arbitration awards subject to the FAA.[1] While the circuits' formulations of the manifest disregard standard vary slightly in wording, the overwhelming consensus is that the critical element of manifest disregard is an arbitrator's refusal to fol-

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[1] *See Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27, 35 (1st Cir. 2006); *Hoeft v. MVL Group*, 343 F.3d 57, 69 (2d Cir. 2003); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003); *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216-17 (5th Cir. 2006); *Solvay Pharms. v. Duramed Pharms.*, 442 F.3d 471, 475 n.3 (6th Cir. 2006); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005); *Carter v. Health Net of Cal., Inc..*, 374 F.3d 830, 838 (9th Cir. 2004); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1274 (10th Cir. 2005); *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005); *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365-66 (Fed. Cir. 2001).

low what he knows to be the law. *See Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985).

In this case, the Fourth Circuit applied the well-settled principle that an arbitrator's knowing refusal to follow the law as he understood it is a ground for vacating an award. Although petitioners repeatedly say the Fourth Circuit adopted a "new" variant of the standard, the panel's opinion emphasized, consistent with precedents of the Fourth Circuit (and the other courts of appeals) that the manifest disregard standard places a "heavy burden" on a party seeking to vacate an award—a burden that can be satisfied "only where the 'arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same.'" Pet. App. 9a (quoting *Remmey*, 32 F.3d at 149, and *Upshur Coals*, 933 F.2d at 229).[2] Judge Luttig's dissent acknowledged that the majority correctly stated the law, and reluctantly took issue only with the panel's *application* of the governing standard. *Id.* at 14a-16a (Luttig, J., dissenting). Petitioners echo Judge Luttig's criticisms of the way the panel applied the standard, but "misapplication of a properly stated rule of law" is generally not a ground for granting certiorari. S. Ct. R. 10.

B. The Fourth Circuit Did Not Adopt a "New Test" Permitting Vacatur of Merely "Unreasonable" Contract Interpretations.

Petitioners insist that the Fourth Circuit adopted a "new test" of manifest disregard that permits a court to set aside an arbitration award whenever it finds an arbitrator's contract interpretation unreasonable—a test petitioners say conflicts with the law in all other circuits. Pet. 12. Petitioners' argu-

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[2] The court did not require that the arbitrator expressly state the correct law before disregarding it, but courts agree that "[t]he manifest disregard doctrine is not confined to that rare case in which the arbitrator provides us with explicit acknowledgment of wrongful conduct...." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 218 (2d Cir. 2002).

ment rests on a distortion of the Fourth Circuit's ruling—a ruling that is fully consistent with the way other courts of appeals apply the manifest disregard standard to blatant deviations from unambiguous contracts.

The Fourth Circuit made clear that a court may not vacate an award "merely because [it] concludes that an arbitrator has 'misread the contract.'" Pet. App. 9a. Citing Fourth Circuit precedent, the court held that vacatur is appropriate "only when the result is not 'rationally inferable from the contract.'" *Id.* at 10a (quoting *Apex Plumbing Supply*, 142 F.3d at 193 n.5). The court also emphasized that the manifest disregard standard requires the court to find that the arbitrator correctly understood but ignored the law. *Id.* That standard was satisfied, the court held, when the arbitrator understood the unambiguous import of contractual language but instead "based his award on his own personal notions of right and wrong." *Id.* (quoting *Upshur Coals*, 933 F.2d at 229).

Contrary to petitioners' assertion, the Fourth Circuit's holding that an arbitrator's knowing refusal to give effect to unambiguous contractual language can evidence manifest disregard of law does not conflict with the law of other circuits. In fact, courts in circuits whose law petitioners claim conflicts with the Fourth Circuit's so-called "new rule" agree that manifest disregard of clear contractual terms is a basis for vacating an arbitration award.

Petitioners contend, for example, that the outcome below conflicts with Eighth Circuit case law. Pet. 12. But the Eighth Circuit, in a decision relied upon by the Fourth Circuit (but virtually ignored by petitioners), has held that an arbitrator may not "disregard or modify unambiguous contract provisions" and that an arbitrator "acts without authority" if he refuses to give effect to the "plain meaning" of "unambiguous language." *Missouri River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 855 (8th Cir. 2001). Unlike petitioners, but like the Fourth Circuit, the Eighth Circuit saw no inconsistency between these propositions and the principle that

"[a]n award 'manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.'" *Id.* at 854 (citation omitted).

Similarly, although petitioners claim that the result below could not be sustained under the law of the First Circuit, that court has stated *repeatedly* that, under its manifest disregard standard, an award may be vacated if the arbitrator knew it was "contrary to the plain language of the contract." *Gupta v. Cisco Sys.*, 274 F.3d 1, 3 (1st Cir. 2001); *accord, Wonderland Greyhound Park v. Autotote Sys.*, 274 F.3d 34, 36 (1st Cir. 2001); *Bull HN Info. Sys. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000). And petitioners' assertion that the result below conflicts with the law of the Sixth Circuit is contradicted by the very opinion they cite, *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies*, 401 F.3d 701 (6th Cir. 2005), which says an award may be overturned if the arbitrator was not "even arguably construing or applying the contract." *Id.* at 712.

Indeed, even the Seventh Circuit precedents cited by petitioners, which petitioners contend reflect the narrowest view of manifest disregard taken by any federal appellate court, acknowledge that "in the typical arbitration," which like the one in this case "is concerned with interpreting a contract," an arbitration award may be overturned if the arbitrators "failed to interpret the contract at all" (as opposed to interpreting it in a way that is "incorrect or even wacky"), because in such a case the arbitrators "excee[d] the authority granted to them by the contract's arbitration clause." *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006). That view is fully consistent with the Fourth Circuit's ruling here, which permits vacatur only when the court finds that the arbitrator based an award not on the contract but on "his own personal notions of right and wrong" or some other basis not even "rationally inferable from the contract." Pet. App. 10a.

Petitioners cite *no* authority holding that disregard of unambiguous contract terms, no matter how blatant and obviously deliberate by the arbitrator, may *never* constitute mani-

fest disregard of law.[3] Absent such authority, their claim that the Fourth Circuit's extremely limited definition of the circumstances where disregard of contract terms may justify vacatur creates no conflict among the circuits.

C. Semantic Differences Among the Circuits in Describing the Manifest Disregard Standard Do Not Amount to a Conflict.

Beyond incorrectly claiming that the Fourth Circuit is alone in permitting the manifest disregard test to be satisfied by an arbitrator's deliberate disregard of unambiguous contractual language, petitioners assert that there is a four-way conflict among the circuits over the standard of manifest disregard. In fact, aside from minor semantic differences in the way the circuits describe the standard, there is a remarkable consensus among the circuits over the essential elements of a manifest disregard claim.

The fundamental requisite of a claim of manifest disregard is, as the majority and dissent acknowledged below and the overwhelming majority of the circuits agree, that "a manifest disregard of the law is established only where the 'arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same.'" Pet. App. 9a (citation omitted); *accord id.* at 14a (Luttig, J., dissenting). The cases petitioners cite make clear that such knowing and deliberate disregard of the law is the key element of the manifest disregard standard in the First, Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. *See* Pet. 12-13. Although petitioners contend that the Third Circuit has not explained what

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[3] Petitioners say the Fourth Circuit's decision conflicts with *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006). The Eleventh Circuit's holding there—that an error in contract construction does not justify vacatur unless the arbitrators recognized and deliberately disregarded an applicable rule of law, *id.* at 912—does not conflict with the Fourth Circuit's ruling here, which also permits vacatur only where an arbitrator both understands and disregards the law. Pet. App. 9a.

manifest disregard means (*see* Pet. 12 n.4), that court, too, has said a party seeking to vacate an award for manifest disregard "bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it." *Black Box Corp. v. Markham*, 127 F. Appx. 22, 25 (3d Cir. 2005) (quoting *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).[4]

To be sure, courts do not always use exactly the same words to describe the manifest disregard standard, but as the First Circuit has observed (*Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (citation omitted)):

> This standard of judicial review has taken on various hues and colorations in its formulations in this, and other, circuits. ... Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. We regard the standard of review undergirding these various formulations as identical, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice." ... However nattily wrapped, the packages are fungible.

Despite the circuits' general agreement that manifest disregard involves an arbitrator's conscious refusal to follow the law, petitioners attempt to tease out a conflict among the circuits by arguing that the Second, Sixth, Ninth and D.C. Circuits have adopted a more stringent test than the First, Fourth, Eighth, Tenth, and Eleventh. Petitioners base this assertion on the fact that the former circuits often say that the

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[4] Petitioners do not mention the Federal Circuit, but while that court has had little occasion to apply the manifest disregard standard, there is no reason to think its standard differs from the consensus of the regional courts of appeals. *See Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d at 1365-66.

law disregarded by the arbitrators must be "well defined, explicit, and clearly applicable to the case." Pet. 13.[5]

There is no reason to think, however, that the use of this phrase reflects any real disagreement over the proper standard. In the 20 years since the Second Circuit first stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986), that the law disregarded by the arbitrator must be "well defined, explicit, and clearly applicable to the case," no court of appeals has disagreed with that gloss on the basic standard. Indeed, the Eighth Circuit, which petitioners categorize as *not* requiring that the law be clearly applicable, has expressly *agreed* with *Bobker* that the law ignored by the arbitrator must be "clearly governing." *Marshall v. Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991). The First, Tenth, and Eleventh Circuits have cited *Bobker* with approval, without any suggestion that they disagreed with any aspect of the way *Bobker* described the standard. *See Advest*, 914 F.2d at 9; *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990). Similarly, the Fourth Circuit, in *Remmey*, 32 F.3d at 149-150, approvingly cited the Second Circuit's description of manifest disregard in *Folkways Music Publishers v. Weiss*, 989 F.2d 108, 111-12 (2d Cir. 1993). *Folkways*, in turn, used the "well defined, explicit, and clearly applicable" language from *Bobker*.

The principal reason some courts describing the manifest disregard standard have not quoted *Bobker*'s "well defined, explicit, and clearly applicable to the case" language appears to be that they thought it either went without saying or was not pertinent to the facts before them. For example, in the

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[5] Though petitioners do not mention it, the Fifth Circuit also sometimes states that the law disregarded must be "well defined, explicit, and clearly applicable to the case." *E.g., Brabham v. A.G. Edwards & Sons*, 376 F.3d 377, 382 (5th Cir. 2004).

one case in the Eleventh Circuit that vacated an arbitral award for manifest disregard, the prevailing party in the arbitration had conceded that the law was against it and urged the arbitrators to ignore the law. *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1459 (11th Cir. 1997). Because it was apparent that the legal principle the arbitrators disregarded was well-defined and clearly applicable, the Eleventh Circuit had no reason to focus on that aspect of the standard. Similarly, in this case, the legal principle the arbitrator disregarded—that wholly unambiguous contract language governs the obligations of the parties—is clear and well-defined, and the panel had no need to gild the lily by saying so.

Petitioners also contend that the Fifth Circuit's manifest disregard standard conflicts with that of the other courts of appeals because that court has stated that the manifest disregard inquiry is a two-step process, in which the court first determines whether the arbitrator knowingly disregarded a clearly applicable legal principle and then decides whether the resulting award works a "significant injustice." *Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 762 (5th Cir. 1999). Although the Fifth Circuit is the only circuit that has spoken of the standard as a two-part one, its formulation does not reflect a conflict among the circuits.

To begin with, in articulating its two-part standard in *Williams*, the Fifth Circuit—the last regional circuit to accept the manifest disregard standard—did not say it was *disagreeing* with any of the previous circuits that had adopted the standard. The court said only that its formulation "should prove helpful as a basis for articulating and applying the manifest disregard doctrine." *Id.* at 762. Later decisions make clear that the court substantially agrees with decisions of other circuits defining manifest disregard. *See Sarofim v. Trust Co.*, 440 F.3d at 219 n.8 (stating that *Williams* did not reject the reasoning of the Second Circuit and that Second Circuit cases on manifest disregard are "persuasive authority" even though the Fifth Circuit takes *Williams* as its "starting point").

Moreover, the "significant injustice" inquiry does not make the Fifth Circuit's standard materially different from that applied by other circuits. In the rare circumstance where an arbitrator knowingly disregarded a clearly applicable legal standard, it is difficult to imagine courts finding that an injustice had not occurred. Certainly, the very few cases where federal appellate courts have found manifest disregard have involved circumstances that the courts clearly believed reflected injustice.[6] Moreover, the Fifth Circuit has had no occasion to say when it might find an arbitrator's disregard of law *not* to be unjust, because none of its decisions since *Williams* has found that an arbitrator knowingly disregarded the law, and thus none has reached the issue of "significant injustice."[7] The possibility that the Fifth Circuit might find some deliberate disregard of the law to be acceptable because it involved no "significant injustice" is, at this point, purely theoretical and creates no conflict among the circuits.

D. The Seventh Circuit's Decisions Do Not Create a Conflict Among the Circuits.

Petitioners' most significant claim of conflict involves recent decisions of the Seventh Circuit that state that "when the parties agree to arbitrate without specifying a rule of decision," an arbitration award may be overturned for manifest disregard of law only when it "require[s] the parties to violate the law." *George Watts & Son, Inc. v. Tiffany & Co.*, 248

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[6] Indeed, in this case, even Judge Luttig thought the arbitrator's "clearly erroneous" dismissal of a timely claim was unjust and voted to confirm the arbitrator's decision only "reluctan[tly]." Pet. App. 14a, 16a.

[7] *See, e.g., Williams*, 197 F.3d at 762; *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 795 (5th Cir. 2002); *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 396 (5th Cir. 2003); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 365 (5th Cir. 2003); *Brabham*, 376 F.3d at 382 n.5; *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 355 (5th Cir. 2004); *Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Group*, 93 F. Appx. 1, 6 (5th Cir. 2004); *Sarofim*, 440 F.3d at 213.

F.3d 577, 581 (7th Cir. 2001); *see also Wise*, 450 F.3d at 269.

The *Watts* concept that manifest disregard is limited to the exceedingly unusual circumstance where an arbitrator tells the parties to break the law, however, applies only when the parties have not agreed that the arbitrator is to apply particular legal principles. As Judge Easterbrook conceded in *Watts*, "[i]f the parties specify that their dispute is to be resolved under Wisconsin law, then an arbitrator's declaration that he prefers New York law, or no law at all, would violate the terms on which the dispute was given to him for resolution, and thus justify relief ...." 248 F.3d at 579. Thus, the *Watts* decision expressly acknowledges that "an arbitral order that does not adhere to the legal principles specified by contract [is] unenforceable." *Id.* at 581; *see also BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 555 (7th Cir. 2002).[8]

In this case, the parties' contract specified that it was to be governed by the law of Massachusetts. Pet. App. 3a. Given the parties' agreement on a rule of decision for disputes between them—Massachusetts law—*Watts* does not conflict with the Fourth Circuit's holding that the arbitration award must be vacated because the arbitrator manifestly disregarded that law. Indeed, *Watts* agrees that an arbitrator's refusal to adhere to "legal principles specified by contract," 248 F.3d at 581, requires that the award be vacated.

Similarly, the Seventh Circuit's recent *Wise* decision does not conflict with the result below, as it acknowledges that an arbitration award in a contract case may be overturned if it "failed to interpret the contract at all," because in such a case the arbitrators "exceed[ed] the authority granted to them by the contract's arbitration clause." 450 F.3d at 269.

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[8] *Watts* grounds this principle in Section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4), which provides that an arbitration award must be vacated if it exceeds the arbitrator's powers.

Thus, even granting that *Watts* and *Wise* reflect that the Seventh Circuit panels that decided them feel some general discomfort with decisions of other circuits concerning manifest disregard, they do not conflict with the Fourth Circuit's decision *in this case*, because they expressly permit vacatur of an arbitral decision that manifestly disregards the rules of decision laid down in the parties' contract and fails to reflect a genuine interpretation of that contract.

In any event, it is unclear whether *Watts*'s purported limitation of manifest disregard (in cases where the contract specifies no rule of decision) to arbitration awards that order the parties to violate the law genuinely reflects the law of the Seventh Circuit. Before *Watts*, other Seventh Circuit decisions—in particular *Health Services Management Corp. v. Hughes*, 975 F.2d at 1267—followed the consensus view that an award could be vacated for manifest disregard where the arbitrators "deliberately disregarded what they knew to be the law in order to reach the result they did." *See also Nat'l Wrecking Co. v. Teamsters, Local 731*, 990 F.2d 957 (7th Cir. 1993); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

The Seventh Circuit has not yet resolved the internal disagreement among its opinions over the nature of the manifest disregard standard. The issue has never received en banc consideration. Seventh Circuit rules provide that a panel opinion may not overrule another panel opinion unless it is circulated to all judges of the circuit, and any panel opinion issued through this process must contain a footnote stating that "[t]his opinion has been circulated among all judges of this court in regular active service," and that a majority did not vote for en banc rehearing. 7th Cir. R. 40(e). The *Watts* opinion contains no such footnote, and as a result could not overrule *Hughes* or any other Seventh Circuit precedent.

The Seventh Circuit's failure to resolve the issue internally may reflect that it has not yet really been dispositive of any case. None of the Seventh Circuit decisions that accepted

the consensus standard of the other courts of appeals vacated an arbitration award for manifest disregard. Conversely, in *Watts*, the arbitration award would not have been vacated regardless of whether Judge Easterbrook's "illegality" standard or the consensus standard of *Hughes* had been applied. As Judge Williams, concurring in the judgment in *Watts*, noted: "The question of the continuing justification for and the proper interpretation of the manifest disregard of the law doctrine is not squarely before this court" because "with little effort we may dispose of Watts' claim under the manifest disregard doctrine as it presently exists." 248 F.3d at 581.[9]

Given the status of the manifest disregard standard in the Seventh Circuit, petitioners' claim of a circuit conflict is premature, at best. To the extent the Seventh Circuit's own precedents are in apparent conflict, an intra-circuit conflict that can be resolved by the court of appeals sitting en banc is generally not a ground for exercise of this Court's certiorari jurisdiction. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.6, at 235 (8th ed. 2002). "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Should the Seventh Circuit ultimately settle on a manifest disregard standard that dramatically departs from the consensus of the other circuits (not to mention the precedents of this Court that endorse manifest disregard as a ground for vacat-

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[9] Later Seventh Circuit cases citing *Watts*'s manifest disregard standard have rejected claims that an arbitrator "misunderstood" the law, *Butler Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629, 636 (7th Cir. 2003), or made a "mistake" of law, *Baxter Int'l, Inc. v. Abbott Labs.*, 315 F.3d 829, 831 (7th Cir. 2003), which would not justify relief under the consensus standard of the other circuits. Other Seventh Circuit decisions that approvingly cite *Watts*'s illegality language are even more clearly dicta because, like *Wise*, they do not even involve claims of manifest disregard. *See, e.g., IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F.3d 645, 650 (7th Cir. 2001) ("The plaintiffs wisely do not invoke ... 'manifest disregard of the law[.]'").

ing arbitration awards), and should it apply that standard in a case in which it determines the outcome, it might be appropriate for this Court to exercise its certiorari jurisdiction to bring the Seventh Circuit back in line with the law as it has prevailed for nearly 50 years. Until then, however, the Seventh Circuit's decisions do not indicate a need for this Court to review the consensus manifest disregard standard that prevails in the other circuits—especially not in a case that would come out the same way even under the more extreme of the two competing standards within the Seventh Circuit.

III. There Is No Genuine Conflict over the Application of the "Essence of the Agreement" Standard.

Petitioners assert that the Fourth Circuit's decision creates a conflict among the circuits by invoking the concept that an arbitration award in a case involving a contract issue must "draw its essence from the agreement" of the parties. Pet. App. 9a. According to petitioners, the "essence of the agreement" doctrine properly applies only to labor arbitration, and is not a ground for vacating awards in other arbitrations governed by the FAA. *See* Pet. 15-18.[10]

Petitioners admit that the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits agree with the Fourth Circuit that an arbitration award governed by the FAA may be vacated if it so plainly ignores the terms of an unambiguous contract that it does not draw its essence from the agreement. *See* Pet. 17. But petitioners assert that this consensus of the circuits conflicts with a Second Circuit decision stating that the "essence of the agreement" standard applies only to

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[10] Petitioners do not explain why they think review of arbitration awards under the FAA should be *more* deferential than review of labor arbitrations, given that the policies they cite (*see* Pet. 16, 18) suggest that labor arbitrators should be given *greater* leeway in interpreting collective bargaining agreements in order to maintain "industrial peace" by developing a "common law of the shop." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 581-82 (1960).

labor arbitration. *See Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d at 221-22.

Petitioners, however, fail to mention that Second Circuit precedents also establish that a standard functionally identical to the "essence of the agreement" doctrine (even if not so denominated) applies to arbitration awards under the FAA, which may be vacated if they manifestly disregard terms of an unambiguous contract. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997). The *Toys "R" Us* court, using reasoning strikingly similar to the Fourth Circuit's in this case, grounded this concept in the doctrine of manifest disregard of the law, *see id.* at 25, and stated, in language very close to that of the Fourth Circuit below, that "[w]e will overturn an award where the arbitrator merely makes the right noises—noises of contract interpretation—while ignoring the clear meaning of contract terms." *Id.* In *Westerbeke*, the Second Circuit expressly declined to hold that *Toys "R" Us* was not good law. *See* 304 F.3d at 222. Instead, *Westerbeke* decided the case before it "assuming the applicability of [the *Toys "R" Us*] doctrine," and held that "vacatur for manifest disregard of a commercial contract is appropriate only if the arbitral award contradicts an express and unambiguous term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract." *Id.* That is precisely the standard applied by the Fourth Circuit below. *See* Pet. App. 9a-10a.

Petitioners also argue more generally that the Fourth Circuit's application of the "essence of the agreement" standard conflicts with decisions of other circuits that use the standard in cases governed by the FAA, and that the other circuits disagree with one another about the proper standard. *See* Pet. 19-22. Petitioners' claim of a conflict, however, rests on both a mischaracterization of the Fourth Circuit's decision and on a gross exaggeration of insubstantial differences in the ways the various circuits articulate the standard.

Petitioners' attempt to portray the circuits as broadly in conflict begins with a misstatement of the Fourth Circuit's holding: Petitioners insist that the Fourth Circuit adopted an "unreasonableness standard" for determining when an award fails to draw its essence from the parties' agreement. As we have explained, however, the Fourth Circuit expressly stated that an award may not be vacated merely because an arbitrator "misread" an agreement, but only when the arbitrator's decision is not "rationally inferable" from the agreement and reflects his "personal notions of right and wrong" rather than the unambiguous terms of the contract. Pet. App. 9a-10a.

The very cases petitioners cite show that this standard does not conflict with that of any of the other circuits, which similarly ask whether the arbitrator is "even arguably construing or applying the contract," Pet. 19 (citing First, Third, Ninth, Tenth, and D.C. Circuit authority); whether the award "in some logical way, [is] derived from the wording or purpose of the contract," Pet. 20 (citing 5th Circuit authority); and whether the award is "derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intention." Pet. 20 (citing Eighth Circuit authority).[11] Petitioners themselves admit that the Fourth Circuit's decision does not conflict with the Sixth Circuit's "essence" decisions. Pet. 20-21.

Petitioners' claims that the circuits are generally in disarray in their statement of the "essence" standard fares no better. As petitioners' own citations show, all the circuits, at bottom, inquire whether the arbitrator's award reflects an arguable effort to interpret the parties' contract.[12] Minor differ-

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[11] Petitioners' claim that the decision below conflicts with Eighth Circuit law is ironic in light of the Fourth Circuit's reliance on the Eighth Circuit's holding in *Missouri River Services*, 267 F.3d at 855, that an arbitrator may not "disregard or modify unambiguous contract provisions."

[12] Petitioners' assertion that one factor considered by the Sixth Circuit (whether the award imposes additional requirements not found in the

(*Footnote continued*)

ences in the way the courts articulate the standard from case to case do not amount to a conflict.

What petitioners really object to is not the legal standard applied by the Fourth Circuit, but the way the court applied the standard to the facts here. *See* Pet. 21 (defending "Arbitrator Truesdale's good-faith decision" and arguing that "at worst" he "merely 'fail[ed] to notice'" the contractual language that foreclosed his decision). Petitioners' quibble with the Fourth Circuit's application of a "correctly stated rule of law" is the archetype of a non-certworthy issue. S. Ct. R. 10.

IV. Petitioners' Request That the Court Reject All "Non-Statutory" Grounds for Vacatur, Including Manifest Disregard, Does Not Merit Review.

Petitioners' final and most sweeping argument asks this Court to overturn a half-century of settled law and decide that neither manifest disregard of the law, nor *any* other "non-statutory" ground for vacatur, may be used to challenge an arbitration award. Pet. 22-25. Petitioners never made this argument below, not even in their petition for rehearing en banc, and they should therefore be precluded from raising it in this Court. The argument, in any event, runs counter to this Court's repeated recognition of the manifest disregard doctrine, *see First Options*, 514 U.S. at 942, and the settled law in every federal circuit, *see* n.1, *supra*. If petitioners are correct, Congress has stood silently by for 50 years as the federal courts have radically misinterpreted the FAA. Such "prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for

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contract) conflicts with the way the "essence" standard is applied by other circuits falters on petitioners' inability to cite even one case from another circuit rejecting this criterion. Given that the Sixth Circuit has articulated the standard the same way for over 20 years, *see Cement Divs., Nat'l Gypsum Co. v. United Steelworkers of Am.*, 793 F.2d 759, 766 (6th Cir. 1986), if there were in fact a conflict on that issue, one would think some opinion would have mentioned it by now.

maintaining the status quo." *Hibbs v. Winn*, 542 U.S. 88, 112 (2004) (Stevens, J. concurring); *see also Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004). Congress's 50 years of silence "can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

In the absence of any conflict among the decisions of the courts of appeals or this Court, and in the face of longstanding Congressional silence, petitioners raise the abstract question whether manifest disregard should be characterized as a "statutory" or "non-statutory" basis for vacatur. That issue, too, is more semantic than real. The FAA provides that a federal court may vacate an arbitration award in any case "[w]here the arbitrators exceeded their powers ...." 9 U.S.C. § 10(a)(4). The manifest disregard doctrine has historically been viewed as an application of this language, *see Amicizia*, 274 F.2d at 808, because a manifest disregard of the law is, by definition, one way in which an arbitrator exceeds his or her powers. *See Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 1002-03 (9th Cir. 2003) ("[T]he 'exceeded their powers' clause of § 10(a)(4) ... provides for vacatur only when arbitrators purport to exercise powers that the parties did not intend them to possess or otherwise display a manifest disregard for the law.").

Although courts sometimes refer to manifest disregard as a "nonstatutory" or "common law" ground for vacatur, Pet. App. 7a, that is not the same thing as saying that it is contrary to, or even untethered to, the FAA. On the contrary, the manifest disregard doctrine may properly be regarded as part of the general or common federal law of arbitration that has developed to supplement the concise language of the FAA and effectuate the statute's broad policies. Indeed, even the Seventh Circuit's most restrictive decision concerning manifest disregard acknowledges that "manifest disregard of the law" is "often" covered by § 10(a)(4), and that where, as here, "the parties specify that their dispute is to be resolved under" a particular rule of decision and the arbitrator deliber-

ately departs from that rule of decision, the arbitrator's award "would violate the terms on which the dispute was given to him for resolution, and thus justify relief under § 10(a)(4)." *Watts*, 248 F.3d at 578-89.

Despite their protests about "the kind of merits-based review that has become endemic in the lower courts," Pet. 23, petitioners concede that federal-court vacatur of an arbitration award is a rarity. Under current law, review by courts "only occasionally alters the outcome of an award" and challenges to awards based on manifest disregard "are unsuccessful in the vast majority of cases." Pet. 26-27. Tellingly, petitioners report that—despite what they characterize as an overly generous manifest disregard standard throughout the circuits—their Westlaw search of all federal court of appeals cases revealed a universe of less than two hundred cases applying the doctrine, including *only six vacated awards*, one of which was reinstated upon remand to the arbitrator.

These small numbers reveal the unimportance of the questions presented and contradict the petition's picture of federal courts run amok. Attempting to explain this incongruity, petitioners argue that "the mere availability" of the manifest disregard doctrine "encourages losing parties to challenge arbitral awards," even where doing so is frivolous. Pet. 27. Petitioners' solution is to cut off this avenue of review altogether. The only authority petitioners cite for their argument that frivolous challenges are becoming a problem is *B.L. Harbert International v. Hercules Steel Co.*, 441 F.3d at 913. There, the court discussed what to do "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief that it prevail[.]" *Id.* But *Harbert* does not say such frivolous claims are any more common than other kinds of frivolous claims. And, more importantly, *Harbert* proposes a very different solution than do petitioners—namely, "insist[ing] that if a party on the short end of an arbitration award attacks that award in court with-

out any real legal basis for doing so, that party should pay sanctions." *Id.* The availability of such ordinary remedies for abusive litigation underscores the lack of any pressing need for this Court's review.

Moreover, while the Eleventh Circuit's threat of sanctions may be severe, it is far less extreme than the approach proposed by the petitioners. Petitioners' position, if accepted, would eliminate any safety valve for the rare case in which an arbitrator truly strays beyond the bounds of his or her authority. The presence of such a safety value bolsters the integrity of, and public confidence in, the alternative dispute resolution process as a whole.

Such a safety valve is particularly important in cases such as this one, in which there is a risk that, absent any possibility of review, federal statutory rights will devalued. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)—a case that, like this one, included allegations of age discrimination in violation of federal law—this Court concluded that cases involving statutory rights are subject to arbitration, but it rested this conclusion on two fundamental assumptions about how arbitration operates. First, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Second, "'although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue.*" *Id.* at 32 n.4 (quoting *Shearson/Am. Express v. McMahon*, 482 U.S. at 232) (emphasis added).

As the courts of appeals have recognized, "[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1487 (D.C. Cir. 1997); *see also Williams*, 197 F.3d at 761 ("The federal courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes."). By proposing to discard the manifest disregard doctrine, petitioners seek to eliminate a fundamental protection on which the arbitrability of statutory claims is premised.

Petitioners' sweeping attempt to discard the manifest disregard doctrine would not only overturn the law of every circuit, but would call into question the settled expectation that statutory discrimination claims such as respondent's are subject to mandatory arbitration. An established consensus in the lower courts, supported by statements of this Court, should not be overturned merely because a litigant is dissatisfied with the application of the law to the facts of its case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-49

In The Supreme Court of the United States

JOHN HANCOCK LIFE INSURANCE COMPANY; SIGNATOR INVESTORS, INC.; SIGNATOR INSURANCE AGENCY, INC.,

Petitioners,

vs.

RALPH F. PATTEN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

I. The Issues Are Preserved for Review

Respondent's claim that Petitioners did not "properly raise" below the arguments they raise here (Opp. 5) is wrong. *First*, as the Fourth Circuit agreed, Petitioners below invoked "the circumscribed scope of review which [the federal courts] are obliged to apply in assessing an arbitration award." Pet. App. 10a. That issue – *i.e.*, how circumscribed a court's review of the merits of an arbitral award must be – is exactly the issue raised here. "'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted).

Second, Respondent argues Petitioners did not challenge prior Fourth Circuit precedent below and relied in part on *Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (4th Cir. 1994). This ignores that *Remmey* was fully consistent with the strict articulation of manifest disregard in the Second and Ninth Circuits: that the "'arbitrators understand and correctly state the law, but proceed to disregard the same.'"[1] *Id.* at 149. Although the court below quoted the *Remmey* standard, it proceeded to reformulate the standard in a way that is radically at odds with *Remmey*'s words. *See infra* at 2-4.

Third, contrary to Respondent's argument, Petitioners did not waive the argument that the "essence of the agreement" standard does not apply under the FAA. Petitioners urged below that "'[a] legal interpretation of an arbitrator may *only* be overturned where it is in manifest

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[1] This quotation ultimately comes from *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961). Petitioners also quoted *Jih v. Long & Foster Real Estate, Inc.*, 800 F. Supp. 312, 320 (D. Md. 1992), quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986).

disregard of the law.'" Answering Brief 6 (emphasis added). The Fourth Circuit rejected this claim, expressly noting its decision conflicted with *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 220-21 (2d Cir. 2002). The issue was not only "pressed" but "passed upon" below. *See, e.g., Lebron*, 513 U.S. at 379.

Fourth, this Court may consider questions antecedent to the precise issues considered below. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-48 (1993). As Respondent acknowledges, it would have been futile to ask the panel to disregard Fourth Circuit law allowing some measure of merits review of arbitral awards.

Finally, Respondent was not required to petition the Fourth Circuit *en banc* to repudiate the "manifest disregard" or "essence of the agreement" doctrine. *See* Opp. 6-7. A petition for *en banc* review is not a prerequisite to seeking certiorari. *See* S. Ct. R. 13(3). Moreover, if Petitioners had succeeded in persuading the court, *en banc*, to repudiate the manifest disregard doctrine, that would only have exacerbated, not resolved, the conflict among the circuits.

II. This Case Presents Genuine Intercircuit Conflicts

A. In Conflict with Every Other Circuit, the Court Below Did Not Require a Showing of Actual Arbitral Misconduct.

Respondent's main answer to the conflicts between the decision below and the law in at least ten other circuits is to insist this case involved a "*knowing refusal* [by the arbitrator] to follow the law as he understood it." Opp. 9 (emphasis added).[2] Respondent thus concedes that, at

[2] *See also* Opp. 10 ("knowing refusal to give effect to unambiguous contractual language"), 11 ("arbitrator knew [award] was 'contrary to the plain language of the contract'"), 12 ("deliberate disregard of

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least in every circuit *except* the Fourth, an arbitrator must be "fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it," before vacatur is appropriate. *Id.* at 13. Respondent argues that, since the court below paid lip service to this test, no intercircuit conflict exists. *Id.* at 9.

Respondent's argument ignores the Fourth Circuit's stated grounds for vacatur. Nowhere did the majority find Arbitrator Truesdale *knew* his decision was contrary to applicable law. There would have been no basis for such a finding, as the full arbitral record was not submitted in the record below.

The Fourth Circuit recognized that the Management Agreement was ultimately silent on the matter of a filing period, and that there is substantial authority that an arbitrator may supply implied terms when a contract is silent. Pet. App. 11a. Arbitrator Truesdale doubtless believed in good faith (and in Petitioner's view, correctly) that contractual silence did not mean that the filing time was unlimited, and that he could "look . . . for guidance" to the parties' prior agreement, *id.* at 30a – even if that agreement was no longer in force – in determining what limit was reasonable. *See also id.* at 87a (Respondent's concession that the two agreements were "independent, yet complimentary").

The Fourth Circuit, however, found that this approach "contradicted the plain and unambiguous terms of the Management Agreement," which stated it "'supersede[d]'" prior agreements, and the court suggested that the only "reasonable" way to fill the gap would be through a complex choice-of-law analysis. *Id.* at 11a-12a. On that basis, the court held the arbitrator "*appears* to have revised the governing arbitration agreement on the basis of his own 'personal notions of right and wrong.'" *Id.* at 12a (emphasis added).

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unambiguous contractual language" "knowing and deliberate disregard of the law"), 13 ("conscious refusal"), 15 (same).

As Judge Luttig pointed out, the majority in no way required that the arbitrator in fact consciously ignored the law. *Id.* at 14a-15a. In effect, the majority reinterpreted "manifest disregard of the law" to mean apparent disregard of the law, and found that the law "appears" to have been disregarded when the arbitrator's interpretation of "unambiguous" contractual terms is "not reasonable" in the court's view. *Id.* at 12a, 11a. The court's approach thus reduced "conscious disregard" to a fiction by equating it with "clear error." *See id.* at 14a (Luttig, J., dissenting).

In sum, the Fourth Circuit's error was not a mere misapplication of a correctly-stated standard. Rather, the court articulated and applied a wholly incorrect standard, which effectively reinterpreted and reformulated the stricter standard it quoted from prior cases. This presents a clear conflict with other circuits, warranting this Court's review.

B. The Standard Applied Below Undisputedly Conflicts with the Seventh Circuit's "Excess of Authority" Standard.

In any event, Respondent agrees that the Seventh Circuit applies a stricter "manifest disregard" standard than the Fourth or any other circuit applies. Opp. 20. In the Seventh Circuit, an award can be vacated for "manifest disregard" only if the tribunal exceeded its authority by (1) directing the parties to perform an illegal act, or (2) openly refusing to apply a rule of decision explicitly required by the parties' contract. *See Wise v. Wachovia Sec., LLC*, 450 F.3d 265 (7th Cir. 2006); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001). In contrast, the Fourth Circuit's version of "manifest disregard" does not depend, even vaguely, on a showing that arbitrators exceeded their powers.

Respondent's lengthy argument that this case does not implicate this patent conflict between the Fourth and the Seventh Circuits (Opp. 17-20) is wholly without merit.

For example, Respondent's argument that *Watts* would allow vacatur, because the contract here supposedly required the arbitrator to apply Massachusetts law, not only has nothing to do with the reasoning of the court below but is plainly incorrect. The contract provides only that "[t]his Agreement" should be construed under Massachusetts law, Pet. App. 82a; it is silent on the law governing statutory claims related to the contract. *See* Pet. 8 n.2. Moreover, the time for bringing a claim is a procedural matter separate from the law governing the underlying claim. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-30 (1988); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-60 (1995). And in any event, there is no indication that the arbitrator here believed that looking to a prior contract for guidance in selecting an appropriate time limit, *see* Pet. App. 30a, breached Massachusetts law. *See, e.g.*, *Rational Software Corp. v. Sterling Corp.*, 393 F.3d 276, 279 (1st Cir. 2005) (looking to parties' prior course of dealing).

There also is no merit in Respondent's convoluted assertion that the Court should await some future Seventh Circuit *en banc* proceeding, in which the obscure differences Respondent perceives between *Watts* and *Wise* will one day be worked out. *Wise* cites *Watts* approvingly and reiterates the Seventh Circuit's strongly worded rule that manifest disregard may be found only "where the arbitrators exceeded their powers" and "direct the parties to violate the law." *Wise*, 450 F.3d at 268-69. The test in *Wise* – "whether the arbitrators had failed to interpret the contract at all," *see id.* at 269 – cannot be squared with the Fourth Circuit's judgment here, which turned on whether the arbitrator merely "appears" to have revised the agreement. Pet. App. 12a, 11a.

C. The Standard Applied Below Undisputedly Conflicts with the Fifth Circuit's "Significant Injustice" Standard.

Respondent also concedes that the Fifth Circuit, unlike the Fourth, would require him to show that enforcement

would "result in significant injustice" before an award could be vacated for manifest disregard. Opp. 15-16. He seeks to minimize this conflict as "purely theoretical," asserting that the Fifth Circuit has never vacated an award for manifest disregard. *Id.* But in the Fifth Circuit, Petitioners would have had a chance to prove the arbitrator's alleged error worked no injustice. That opportunity could well be dispositive, as Arbitrator Truesdale's approach granted Respondent a period for his statutory claims longer than or equal to that available in state or federal court. Pet. 8-9 n.2.

D. The Standard Applied Below Undisputedly Conflicts with Second Circuit Law Limiting the "Essence of the Agreement" Doctrine to Collective Bargaining Agreements.

The court below expressly stated that its application of the "essence of the agreement" test to a non-labor arbitration award conflicts with *Westerbeke*, 304 F.3d at 221-22. Respondent argues, however, that the "manifest disregard of the law" standard the Second Circuit applies in FAA cases is "functionally identical" to the "essence" doctrine. Opp. 21.

The Second and Fourth Circuits, however, treat "essence of the agreement" and "manifest disregard" as two distinct grounds for vacatur. Pet. App. 10a n.8; *Westerbeke*, 304 F.3d at 221-22. Moreover, the Second Circuit's "manifest disregard" test bears little resemblance to the "essence of the agreement" test applied below. In the Second Circuit, absent "explicit acknowledgment of wrongful [arbitral] conduct," an award may not be vacated for "manifest disregard" if it has even a "barely colorable" justification. *Id.* at 222. The Fourth Circuit's inference that the award did not "draw its essence" from the contract based on its substantive disagreement with the arbitrator's conclusion, Pet. App. 13a, employs the opposite presumption. That clear conflict merits the writ.

III. The Decision Below Substantially Conflicts with the FAA's Plain Language and This Court's Commitment to the Efficiency of Arbitration

Respondent argues that reversal here would "overturn a half-century of settled law." Opp. 23. The law on "manifest disregard" and "essence of the agreement," however, is anything but settled, and the rift in the lower courts on how to read this Court's brief and unexplained statements on the subject only grows wider. As the Seventh Circuit has stated, "the law in [this and] other circuits is . . . confused, doubtless because the Supreme Court has been opaque. The dictum in *Wilko* and *First Options* was unexplained and unilluminated by any concrete application." *Watts*, 248 F.3d at 580 (citing *Wilko v. Swan*, 346 U.S. 427 (1953), and *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995)).

Over fifty years after *Wilko* and nearly fifty years after the *Steelworkers* trilogy,[3] it is time for this Court to end the confusion. While the parties disagree about the propriety of merits review of arbitral awards, they agree this issue is crucial to the appropriate use of scarce judicial resources and to the use of arbitration as a mechanism for resolving disputes outside of litigation. *See* Pet. 25-26; Opp. 27.

Use of "manifest disregard" to delay or avoid enforcement has exploded in the last decade,[4] encouraged by

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[3] *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[4] Westlaw searches show that, since 2000 alone, there have been at least 400 decisions in the District Courts addressing "manifest disregard," as a ground for vacating arbitration awards. Of the 197 cases ruling on the issue in the courts of appeals, *see* Pet. 27 & n.10, more than 70 percent were decided in the last decade. At least four more published appellate decisions (all in conflict with that below) have issued since the petition was filed. *See McCarthy v. Citigroup Global Markets Inc.*, No. 06-1001, 2006 WL 2673424 (1st Cir. Sept. 19, 2006) (to be published in F.3d); *D.H. Blair & Co., Inc. v. Gottdiener*, No.

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confusion in the law exemplified by the decision below. This trend increasingly threatens to turn arbitration from an alternative to litigation into a prelude to litigation. *See B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006). Even a cursory look at the lower court decisions on manifest disregard shows that merits review results in a full reexamination of the issues, no matter how deferential the standard applied. As Respondent concedes (Opp. 25) such review in all but the rarest cases leads to enforcement of awards, imposing great costs on the judiciary and parties while yielding concrete benefits to exceedingly few litigants.

The idea that this wasteful practice can be curbed by awarding fees and costs for abusive filings is mistaken. The lack of clarity in the law, exacerbated by decisions such as that below, makes it nearly impossible to distinguish frivolous from arguably meritorious filings, at least in some circuits. Allowing two layers of merits review on top of the arbitral process undermines parties' expectation that arbitral awards will be final and binding and frustrates this Court's mandate that arbitration agreements must be enforced so as to minimize litigation cost and delay. Pet. 26a.

Respondent asserts that this Court has "repeated[ly]" recognized the manifest disregard doctrine, citing *First Options*, 514 U.S. at 942. Opp. 23. But the Court's reference to "manifest disregard" in *First Options*, no less than in *Wilko* itself, was a passing dictum that did not directly confront the relevant provisions of the FAA or the policy underlying them. Both *Wilko* and *First Options* would have turned out the same way even assuming there is no merits review of arbitrators' awards: In *Wilko*, the issue was whether arbitrators could be trusted to decide Securities Act claims; in *First Options*, it was whether the parties had agreed to arbitrate disputes over the arbitrators'

04-3260, 2006 WL 2551218 (2d Cir. Sept. 5, 2006) (same); *Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1176-77 (10th Cir. 2006); *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354-55 (D.C. Cir. 2006).

jurisdiction. The lower courts' perception that they are bound by these dicta has stymied their ability to develop the law coherently without further guidance from this Court. *See* Pet. 29 (citing cases); *Major League Baseball Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (Stevens, J., dissenting) (citing lack of guidance on "essence" test in labor cases).

Contrary to what Respondent suggests, Petitioners do not dispute that an arbitrator's deliberate refusal to apply mandatory law can sometimes give rise to statutory grounds for vacating an award. *See* Pet. 10-11. In *Wilko*, for example, the Court was faced with a statutory provision that, in express terms, precludes parties from contractually waiving compliance with the Securities Act. 346 U.S. at 430. It follows that, if parties agree in advance to arbitrate securities claims, their arbitration agreement may not direct or empower the arbitrator to intentionally disregard the requirements of the Securities Act. *See id.* But, to enforce this requirement, a court need only "ascertain that the tribunal took cognizance of the [statutory] claims and actually decided them," and may not examine the merits of the award. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991).

In the case below, and in other cases like it, the provision that the arbitrator was found to have "manifest[ly] disregard[ed]" was merely a contractual provision, modifiable at any time by mutual consent and entrusted by the parties to interpretation by their chosen arbitrator. Though Respondent's claims included statutory nondiscrimination claims, the *statutory* limit for those claims was in no event longer than the one-year implied *contractual* limit applied by Arbitrator Truesdale. *See* Pet. 8-9 n.2. Respondent did not argue, and the Fourth Circuit did not find, that the arbitrator's decision was contrary to a statute, but only that it was contrary to a contractual provision. Any "safety valve" that may be required to protect statutory non-waiver requirements (Opp. 26) is

unnecessary and inapplicable in a contract interpretation case such as this.

Petitioners seek review of the basic question of when and under what circumstances there may be review of the merits of an arbitral award, despite the clear congressional command that no such review is to be had under the FAA. *See* 9 U.S.C. §§ 10, 11; Pet. 22-25. Respondent offers no good reason to deny review on these basic questions, which repeatedly arise in litigation and to which only this Court can bring clarity.

CONCLUSION

For all of the foregoing reasons and those stated in the petition for certiorari, the Court should grant the petition and reverse the judgment of the Court of Appeals.

Dated: New York, New York
September 26, 2006

Respectfully submitted,

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